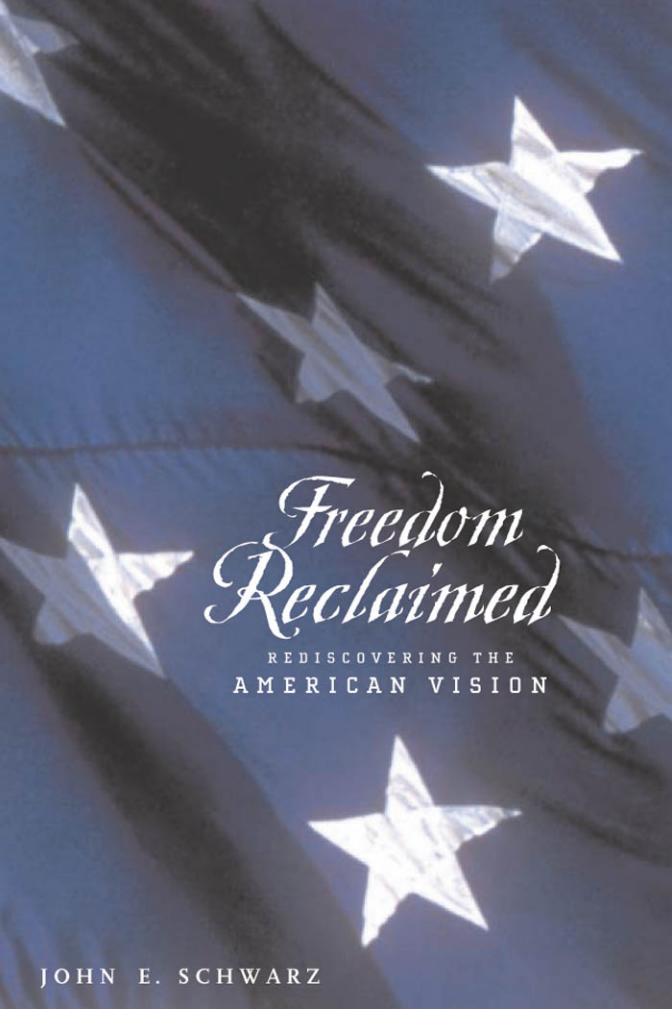
Freedom Reclaimed
REDISCOVERING THE
AMERICAN VISION
JOHN E. SCHWARZ

VISIT…

Freedom Reclaimed

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Freedom Reclaimed

Rediscovering the American Vision

John E. Schwarz

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For my students, with profound gratitude for all that
you are and all that you have taught me

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Preface

The Declaration of Independence might be thought of as our nation's birth announcement. That same announcement contained the Founders' charge to the nation, a vision for the nation to strive toward in the years, decades, and centuries to come.

Among the first words the Declaration uttered in the name of the new nation were: "We hold these truths to be self-evident, that all men are created equal." Those words and the ones following them have proven to be timeless not just in our own but in countless hearts across the globe. Behind the words lies the premise that each human being is sacred and therefore inviolable. That sacredness and that inviolability hold true even in a world in which religious or ideological certainty, or science and scientific discovery, or the coming of a mass standardized industrial age might tempt and urge us to believe otherwise. If each human being is sacred and inviolable, none may be regarded simply as a means to the ends of others. Each individual must also be able to be his or her own end purpose. In order for that to happen, however, each person must have freedom. Thus, the Declaration immediately continued with its transcendent proposition that all individuals are endowed with the "unalienable rights [of] . . . life, liberty and the pursuit of happiness."

This book is about the dearest political value in the lives of most Americans, individual liberty, or freedom, which I use as synonyms. More particularly, the book describes how we have come in our nation to accept a meaning of freedom that is unsustainable morally within its own method of reasoning and at odds with the vision of freedom held by many of the nation's Founders. The book also speaks to the numerous implications of this misconception for our capacity as a nation to arrive at a satisfying idea of the common public good; our ability to recognize and feel the ties we have to one another as a people; how we think about the nation's story and our own part in it; the way we look at government itself and the understanding we have of our national policies; and,

finally, the serious consequences for our personal lives, many of them well hidden from us at present. In the book, I speak primarily to the areas of economic and political freedom, not to every aspect of the idea.

With its focus placed so squarely on the individual person, it is easy to see why the idea of freedom encourages us to be cautious about government and its role in society. Government accents the collectivity rather than the individual; even more, government accents the coercive powers of the collective society over the individual. The free-market view of freedom that is ascendant today starts with these points uppermost in mind. Partly as a consequence, this view pushes the role of the government and collective societal action generally—in contrast to voluntary exchange among individuals—fairly well off onto the margins of a free society. Doing so, however, downplays or entirely disregards a host of mutual obligations that the reasoning of freedom says we have to one another as well as toward the society as a whole. Meeting the obligations is necessary for freedom to be moral within its own logic, as we will see, yet honoring them demands collective societal decisions and a highly energetic public sphere. I call freedom that recognizes and embraces those mutual obligations "genuine" because only it is morally tenable according to freedom's own way of reasoning.

Because free-market freedom does not contain the kind and range of obligations we owe one another as free individuals, necessary for freedom to be moral, it is indefensible within the reasoning of freedom. It is therefore unable to produce a sustainable understanding of the common public good, one that remains consistent with freedom's logic. For this reason, it does not enable us to discover what actions we need to take as a nation in a way that is morally comprehensible to us.

Moreover, subscribing to free-market liberty results in the nation feeling hollow at its core. As I show, adherence to free-market liberty leaves a gaping void. Morally flawed as a public philosophy, even within its own terms, free-market liberty does not have the power to gain our true respect. And, in depreciating our obligations to each other, it fails to furnish a way for us to understand and feel the bonds we have with one another as individual Americans. It also leaves us feeling at odds with much of our past history, marked as that history has been by huge expansions of government and collective societal actions that a free-market point of reference does not easily comprehend—indeed, often reviles. Finally, obviously, we cannot act morally as a nation in keeping with our most basic value of freedom—or truly feel that we have done

so—if we are working from a view of freedom that fails on moral grounds even within its own logic.

It is possible to build a firm foundation that will not simply resolve but elevate our thinking in all of these and other areas. To do so, we must reclaim a philosophy of freedom that is defensible within its own terms of reasoning and that also connects us with the vision of the Founders. That is what the idea of genuine freedom offers.

In my view, genuine freedom represents the true American idea of freedom because it does flow logically from the reasoning of freedom and because it mirrors the essence of the Founders' own thinking, the quintessential idea of a free society for many of them. The book shows how genuine freedom engages the Founders' views about freedom and how it follows from the traditions of thinking they drew from. Also, the book shows how, at least until very recently, genuine freedom reflects much of the story of the nation over the modern period, through the past century, in which we have attempted to discover and work out the proper role of the public sphere and activist government in a free society. This great story of transformation gains both meaning and definition through the lens of genuine freedom, whereas it remains largely foreign, almost like a hostile development, when viewed within the framework of free-market freedom.

Today, however, the idea of free-market liberty has acquired enormous power in the way we think about freedom. As a consequence, over the past several decades the nation has altered course and begun to veer away from genuine freedom. In so doing, we have taken a very different direction as a people, entering down an ominous path that leads to a disturbing destination.

Individual freedom is the source of the nation's concept of itself, key to our own identity as Americans. It represents the value we hold up to the world. If freedom has such meaning for us, we must at least make an attempt to live up to its morality. When freedom is violated, individuals are seriously harmed. At the same time, we cannot feel whole as a people if we tolerate wonton incursions against the value with which we identify. Our own history remains incomprehensible, in its moral dimension, unless placed within the context of an intelligible idea of freedom. For all those reasons, we must seek to understand what freedom is and what it requires from us as a society. We must learn where we have stood up to the test of freedom in the past and the degree to which we still do today. We must uncover what we are doing right and where we have lost our way. Those are the aims of this book.

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Acknowledgments

I have dedicated this book to my students because it evolved out of their searching questions, observations, and critiques. It was through a series of courses that I grew to understand and appreciate a main theme behind this book—that freedom is about much more than a person's individual autonomy, let alone his or her self-interested autonomy. Freedom is just as emphatically about our relationships and the moral obligations we have to each other in those relationships which are necessary in order for every individual to be and remain free. My students—what I learned with and through them in those courses—made this book possible.

I received invaluable assistance from many others, as well—colleagues and friends at the University of Arizona and elsewhere. They are Thomas Christiano, Dan Dobbs, Suzanne Dovi, Michael Gottfredson, Amy Gutmann, Kristin Kanthak, Clifford Lytle, Chris Maloney, Jack Marietta, Bill Mishler, Donald Moon, Cary Nederman, Deborah Stone, Tom Volgy, and Glenda Wilkes. In addition, the ideas and editorial assistance of Henry Tom of the Johns Hopkins University Press have been vital throughout the book. Kim Johnson of the Johns Hopkins University Press, Mary Nell Trautner, Dan McGuire, and Dan Stratton of the University of Arizona, and Grace Buonocore, Madelyn Cook, Stephen Ford, David Groff, and Martha Moutray also deserve my thanks. My wife, Judi, and my three children, Jodi, Kaz, and Laurie, gave me essential help and support as did personal friends such as Kevin Courtney and Roby Harrington. Finally, I am grateful for the encouragement shown me by Carol Mann. I want to acknowledge all of these people. To each of them, and to my students, I feel unending appreciation.

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Freedom Reclaimed

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CHAPTER ONE

The Failure of Free-Market Liberty

September 11, 2001. About three hours after the World Trade Center towers and the Pentagon were struck that ghastly Tuesday morning, I held class, an introductory course in American government. Harrowing pictures possessed our minds, of the Pentagon in flames, of black smoke billowing out from the upper side of one of the towers, of its unimaginable collapse followed by the collapse of the other tower. My students and I gathered, stunned, each of us sitting in silenced horror, our eyes cast downward, the excruciating pictures we had witnessed overwhelming our thoughts.

After a while, one of my students, Kristin, looked toward me. Haltingly, and so softly I could barely hear the words she spoke, she asked whether I thought any good could possibly come from the tragedy. The question took me by surprise. I shook my head; I knew of nothing. Silence returned, enveloping us, broken after an indeterminable pause by Brian's voice: "Maybe it's bringing us together," he said. "I've heard people talking about that on TV. That's one good thing, I guess."

Other students nodded. "Everybody in this country has just been *at* each other about everything, for as long as I can remember," said Jennifer, a student

who'd never participated during the first three weeks of our class. "America has felt like it's empty inside, like it has no core." She was speaking to her classmates. Then, turning back toward me, she asked: "Why does it take something that is so awful to bring us together?"[1]

At the National Cathedral three days later during the national service of mourning, the Reverend Billy Graham took up the questions of my students, though from a different angle. Many Americans had wondered about the same things that my students did. Acknowledging his inability to understand or explain why monstrous evil exists, Graham then seemed to answer his own incomprehension, suggesting that evil itself can give birth to great good, to a coming together, to the creation of a stronger spirit of unity than had existed before. Several hours later, former UN ambassador Andrew Young observed that the terrorist attacks "woke us up and helped us to become one." Hendrik Hertzberg of the *New Yorker* called the new feeling of solidarity among Americans "September 11th's only gift."[2]

I still ask, though, just as Jennifer and my other students did, Why does it take such evil for us to recognize our connectedness with one another, to feel that we are united as a nation, to make our collective spirit strong?

Prior to September 11, the national political life we shared as Americans had been infused with malaise, actually profound contempt. Feelings were bitter, everywhere. Americans believed that politics was mostly about politicians, bureaucrats, and powerful groups—generally everyone—advancing their own self-interests, not the larger public good. Politics served little useful purpose. Barely one month before September 11, only 19 percent of Americans said they trusted government to do what was right. Equally disturbing was that the low number surprised no one. Why should anyone be surprised? Widespread cynicism had been poisoning the body politic for the preceding three decades, at least.[3]

Yet even before the attack on America, at that very same time, Americans yearned to believe again in exalted goals. A month before the attack came, columnist David Gergen noted the surprising popularity of David McCullough's lengthy biography, *John Adams,* which had topped the sales charts for weeks. He observed, "The Adams biography has tapped into something in the American psyche, a longing. One suspects that many of us feel that in public life today, we are losing our moorings, that we are living in smaller times, surrounded too often by smaller men. So, we are searching our past, returning to our founders, and to others who renew our understanding of what it means to be an American, and to cause us to thrill once again at the journey we have

taken as a people."[4] Americans sensed a vacuousness. Five days following September 11, reflecting what many people had pointed out in the previous year's election campaign, the *New York Times* wrote that "Americans desperately want to commit to something larger than themselves."[5] Something fundamental, something crucial to the nation, indeed had been missing.

This book speaks to what was missing, *what, in fact, is still missing* save for the external threat of terrorism that now furnishes us with a common bond and a common goal arising out of that fear. What is missing is the feeling that our collective life as a nation itself has some larger meaning, a meaning able to make us feel as one and connect us with one another even absent the threat of a dangerous external enemy, a meaning that restores to us the noblest aims of our history.

To uncover this larger meaning, the book starts from the single idea that gave birth to the nation and still supplies our country with its moral reason and end purpose. It is the idea that has given us our sense of identity as a nation ever since the beginning, the very same idea that we have committed ourselves to preserve against the external enemy, revealed so hideously on September 11, 2001. It is the idea of individual liberty.

The particular idea of freedom that has come to prevail in our country today has taken us down a terribly mistaken road. Although dominating our thinking, it is an idea of freedom that we cannot find meaningful in the end, that we cannot even admire, and that stands opposed to much that we actually do collectively as a people, here at home. So it sets us at odds with our own actions and history. I call it free-market liberty, or free-market freedom.

Most of us would agree that in the general sense the idea of liberty—or freedom—involves the right of each individual to choose what to believe and do for him- or herself free from external restraints as long as he or she does not interfere with the like rights of others.[6] The transcendent power of this general idea comes from its underlying belief that each and every individual is precious. Each person is to be treated as an end in his or her own right and never simply a means to the ends of others, a mere object. In order to be one's own end purpose and not merely a means to the ends of others, each individual must have the right to choose for him- or herself, and the freedom of each individual must be equal. That is a necessary condition.

The general idea of freedom here is what some call "negative freedom."[7] Its emphasis is on the absence of restrictions on an individual as long as that individual does no wrongful harm to others. Other than helping people to

prevent wrongful harm, the notion of individual freedom we have normally does not positively enable a person to do a particular thing, but in regard to that action it keeps the person free from the unwarranted interference of others, including the government.

Perhaps because of its accent on the negative side, the particular view of freedom that prevails today emphasizes being left alone by others and the state, a sort of "Don't tread on me" attitude, like the slogan on the famous Revolutionary flag. Freedom here means the autonomy of the individual to choose how to think and act for him- or herself, to do so in terms that the individual defines to be in his or her own best interest, and in so doing to be unhindered by outside interference. In this common usage, individual freedom is easy to equate with the individualism and pursuit of individual interests that occur in the free market. That is why I call it free-market freedom. President George W. Bush put the view succinctly: "Trade and markets are freedom."[8]

Thinking in terms of free-market freedom, of course, does recognize some need for outside interference, areas in which restrictions on individuals and limits on their choices and actions are appropriate in the name of freedom itself. It is necessary for laws to prohibit crimes against other persons or property and to address concerns such as liability, fraud, patents, and contracts. These and similar concerns, along with national security and possibly public goods such as roads or rudimentary education, describe the primary areas in which liberty allows governmental intervention. A society that confines government to this limited intervention is what advocates of the free-market view call the minimal or night-watchman state. In the free-market view, interventions by government that exceed those areas begin to intrude upon individual freedom and violate the individual's autonomy and pursuit of his or her own individual interest in the name of advancing other goals or values, such as social equality or community.[9]

The more general or fundamental sense of liberty, however, involves something far larger than simply being left alone to follow one's own best self-interest. The idea of freedom is considerably more than a private value. Many of the nation's Revolutionary leaders themselves did not understand the idea of freedom as having such dominant emphasis on the individual's autonomy or on the promotion of self-interest as the prevailing free-market view does. Nor did a succession of later presidents usually considered great, such as Abraham Lincoln or either of the Roosevelts.[10] They instead thought about freedom primarily in terms of the individual's autonomy nested within a complex of obligations

individuals have toward one another, obligations that are required for freedom to be moral. Those obligations, in turn, give rise to abiding feelings of concern and consideration among individuals both for one another and for the larger society. The obligations create conditions for the development of bonds able to connect individuals. Far from being individualistic, that is, freedom is an essentially social idea. Even that seemingly individualistic eighteenth-century rallying cry "Don't tread on me" also summons us not to tread on others—and to help clear a path for fellow Americans to walk on. It must. For without such concern for others and the greater whole, as I will show, the moral foundations of freedom collapse and with them freedom's very timelessness as a visionary force.

The chapters that follow explore this deeper perspective on individual liberty, the kinds of mutual obligations it entails, their profound consequences for our individual lives, and the penetrating new understanding this perspective gives us about both ourselves and the nation. The obligations and duties incorporated in this way of thinking describe genuine freedom. It is genuine, I argue, partly because it reflects the ideas of many of the nation's Founders. But, even more, I call it genuine freedom because only this more fundamental kind of liberty—unlike free-market liberty—is surely defensible within the terms of freedom's own moral reasoning. Its understanding of the mutual obligations and duties we have to one another follows directly from that reasoning. By contrast, the free-market understanding conflicts decisively with the moral reasoning of freedom—this notwithstanding that its leading adherents purport to use this very reasoning when they advance their case. As a consequence, genuine freedom alone is an idea that we can respect and admire. And within a nation claiming freedom as its greatest value, only a kind of freedom that we can respect and admire, genuine freedom, has a capacity to move us. Only it is able to breathe a sense of larger meaning and purpose into our collective lives as Americans.

Some Costs of the Prevailing Idea of Freedom

Emphasis on the mutual obligations we all have to one another, however, is not the dominant perspective today on what freedom means. The view of freedom that prevails today concentrates on the individual's right to decide for him- or herself—on autonomy in individual choice. Within this view, it is almost a given, indeed understood as only natural, that individuals will normally act on behalf of their own self-interests. It is important at the outset to spend a

moment on the troubling repercussions of this view of freedom that follow both from its focus on individual autonomy and from the presumption that individuals, acting freely, will usually pursue their own self-interests.

For one, if freedom involving this kind of autonomy is our standard, no national purpose can exist that reaches much beyond the individual and the self-interests that individuals pursue. There is no tissue joining us to supply a unifying foundation. Everything centers on the individual along with his or her self-interests. On the eve of the first anniversary of the terrorist attacks of September 11, 2001, speaking of the consummate effect the attacks had had on us, President Bush said: "We have been reminded that we are one nation."[11] After September 11, it is true, flags and patriotic stickers appeared in profusion all around, on our homes, our cars, our clothes, as they had not in many people's memory. Why, however, did we need *reminding* that we are one nation? And why did it take such attacks upon the nation to remind us?

An absence of a shared sense of solidarity and anything much enabling us to feel as one is the probable outcome when the leading value of the nation, the value with which the nation identifies, becomes virtually a synonym for the autonomy of the individual and the pursuit of individual self-interest. Prior to the attacks, as a result, nearly everyone felt the gaping void. That's what Jennifer was describing and my other students felt. That's what Billy Graham and Andrew Young were referring to. That's what Hendrik Hertzberg had in mind when he called our newfound unity "September 11th's only gift."

It is said that September 11 changed the nation, forever. In some ways surely—but probably not with respect to our feelings of solidarity. The attacks themselves never translated into a call upon most Americans to do anything differently as individuals, to make real sacrifice—they translated into nothing, that is, besides a willingness to accept a series of tax reductions and consume more to jump-start the economy. The new feeling of solidarity that Hertzberg had extolled weakened with every month's passing, at least until Saddam Hussein replaced Al Qaeda more than a year later. Within a year, even charitable giving by Americans had fallen to levels lower than those prior to the attacks.[12] By the end of that first year, in September 2002, Yale University's Stephen L. Carter observed: "As the first anniversary approaches, we . . . bear an eerie resemblance of the nation we were before that day. . . . Our brief moment of unity—of trying to choose a richer path . . .—has become but a frail memory."[13] Understood in its individualistic and self-regarding version, our idea of freedom only hastens the slide. Unless, that is, we fashion more threats against us from

outside our borders that are able to focus our attention and draw us together. When a nation comes to depend upon odious threats from outside enemies for its citizens to gain an abiding sense of solidarity and collective meaning, though, that nation rests on a disturbingly thin foundation.

Other consequences follow, as well. Identifying freedom with individual autonomy and the pursuit of personal self-interest must diminish us relative to, and set us apart from, any past era and leadership of greatness. The nobility of leaders and eras of the past presumably lay in their advancing high principles, not mere self-interest, and in sacrificing to maintain and promote the common good. Alongside those aims, how little we must seem and be when we emphasize the autonomous individual advancing his or her own interest as our first principle. How small our leaders must appear to us if we view them as acting in this manner. As columnist David Gergen observed barely five weeks before the September attacks, many Americans did believe then that they were living in "smaller times" and were being led by "smaller men," to use his words.[14] Quite a few still may. And with no greater public philosophy than freedom as individualism, increasing numbers will again feel that way unless a war psychology continues, perhaps even then.

At the same time, viewing freedom as individualism engenders a deep suspiciousness of politics and government. If the presumption of self-interested action is true, then today's politics and government—organized groups, elected officials, and bureaucrats—must themselves be self-seeking rather than principled or working to advance the common good. And if freedom emphasizes autonomy, then restrictions on individuals imposed by government easily appear not as necessary for freedom but as the opposite, as incursions on freedom for the benefit of self-interested political groups. Seemingly disconnected from the aims of liberty, politics and government come to be seen as a barrier to freedom rather than a means to it.

It is just as Nobel Prize–winning economist George Stigler described government: "Government has coercive power which allows it to engage in acts (above all, the taking of resources) which could not be performed by voluntary agreement of the members of a society. Any portion of the society which can secure control of the state's machinery will employ the machinery to improve its own position."[15] Government ends up servicing the powerful and taking from everyone else, so that each of us is well advised to be wary and self-protective. Thus we learn from opinion polls that while good numbers of Americans support additional governmental action in some areas, popular pluralities

are also prone to look upon big government as the greatest threat to the country, greater than big labor, greater than big business, this even in the wake of the thundering waves of corporate scandals that became known at the time of the polls.[16] Built upon a bed of suspicion, government—the only way we have to express ourselves collectively as an entire society—turns into an enemy.

Government is not simply the way we express ourselves collectively but also often the only way we preserve our freedom from private power and its incursions. As noted earlier, individual liberty means that a person is protected from unwarranted outside interference—not only governmental interference but also the wrongful interference of *anyone* in our lives, whether it be a corporation, or interest group, or our next-door neighbor, or someone who seeks to coerce us. Regarding these last four, government is often the only place we can seek protection and its intervention our only viable answer. With its focus so much on government as the enemy and limiting the intrusiveness of government, the free-market view fails to accent the ways private power is able to threaten individual liberty. The pages to come reveal many areas in which free-market liberty downplays the dangers that private power poses to our freedom as individuals. In such cases, the expansion of government that free-market advocates decry today as a threat to liberty[17] instead is needed to accomplish the opposite, to protect our freedom as individuals—the very same freedom that free-market advocates purport to desire. Through this fundamental bias, the free-market view greatly confuses the understanding that the general public has about what freedom is and what the well-being of freedom requires.

The Moral Issue

This inattentiveness concerning the threat that private power poses to liberty ultimately produces serious moral issues. The previous section described many costs of holding the free-market view of freedom; the most profound cost of all, however, is the moral cost, described in this section.

Men like Thomas Jefferson and John Locke are not alone in believing that having the capacity for morality is what separates human beings from all other species. If so, moral thinking—that is, seeking rightness in the way we behave toward one another—constitutes the inner essence of humanity. Only through morality can we treat one another as fully human and indeed ourselves become full human beings. For this reason, asking about our morality in relation to the value we most revere makes for high stakes. At bottom, it is to do nothing less

than to ask about our own humanity, or, at the very least, our identity. Here, as the philosopher Michael Walzer pointed out, "The argument is about ourselves; the meaning of our way of life is what is at issue."[18]

The moral objections against today's free-market or individualistic conception of freedom are not merely strong. They are decisive. As the coming pages show, the free-market view is so deeply morally flawed that it cannot provide us with a philosophy we find compelling or meaningful. It cannot because it is defective according to its own process of reasoning. What is missing in the free-market view is the breadth and depth of obligations we have toward one another, both as individuals and as a society, obligations necessary in order for liberty to be surely moral according to its own logic.

The many obligations include not only the willingness to protect each other against wrongful harm—against wrongful taking from one another in its many guises—but also the willingness to assure the availability of economic opportunity that is truly adequate to each individual and the status of full legal as well as political equality. Honoring such mutual obligations is necessary for us to be and remain free as individuals, in the moral sense of the term, whether from private power or from the power of government.

What we will find is that the mutual obligations the free-market view acknowledges in all these areas are too weak to assure the inviolability of each individual as an end in his or her own right, which is the moral bottom line of individual liberty. For this reason, as commentators Daniel Yergin and Joseph Stanislaw correctly observe, "Few people would die with the words *free markets* on their lips."[19] Very simply, the individualistic perspective fails as a compelling idea in terms of the moral reasoning of freedom itself. In order for individual freedom to attain its bottom line, individuals and the larger society must recognize and fulfill responsibilities to each other that reach significantly beyond those that free-market liberty accepts. In turn, the process of honoring those obligations that make freedom genuine furnishes a solid underpinning of ties linking us to one another, ties required for us to feel, from within, that we are one nation, absent needing the existence of perilous external forces. It is through this rich fabric of mutual obligations that we have toward one another, contained in the moral reasoning of individual liberty, that the worlds of the "I" and the "We" join and are able to fit together. Just as important, only through recognition and understanding of those obligations can we fashion a public philosophy about individual freedom that is surely moral and so has the power to stir and inspire us and gain our esteem once more.

From the Present to the Future

Still other consequences follow. To the degree that the moral defects of free-market liberty have come to define public policy, they have resulted in violations of genuine freedom affecting the lives of many Americans on a daily basis and at every level—economic, political, and legal. The violations have left more than half of all Americans profoundly harmed, a conclusion amply demonstrated in the book. The stakes for average Americans and their families arising from the difference between a world ruled by free-market liberty and one ruled by genuine liberty are very high.

Notwithstanding the harms it has inflicted and its many other drawbacks, free-market liberty has grown more powerful in our thinking about what freedom means and entails over the past several decades. That reality has given conservatives immense political advantage within a culture that prizes freedom. Conservative leaders stress freedom of the free-market kind in their economic philosophy and program, at times adding calls for compassion to it. Some label their cause "the freedom revolution," appropriating the word unto themselves.[20] Here liberals have been willing accomplices. True, the word *liberal* is fashioned from the word *liberty*. True, liberals advocate honoring many of the obligations necessary to make freedom moral and just within freedom's own process of reasoning. True, Franklin Roosevelt once gave us the four freedoms that underlay his New Deal. He spoke eloquently in the language of freedom. So, after him, did Jack Kennedy.

Nevertheless, over recent years, liberals have increasingly expressed key parts of their agenda in terms of values other than freedom—values such as social equality, equity, solidarity, and fairness. This accent on equality and other values is an important reason that the obligations have become lost or diminished in our minds as obligations of freedom. Appealing to other values does at times succeed, but it is nearly always an uphill struggle. There can be little denying that free-market conservatism emphasizing the language of individual freedom has fared very well politically over the past half century. By contrast, as it became increasingly associated in the public mind with aiming toward social equality instead of freedom, liberalism has turned into something of a dirty word.

Very much to their chagrin, liberals have found their influence on the wane. Now barely one out of every six Americans identifies him- or herself as liberal. Forty years ago, to the contrary, the number of Americans who said they were

liberal in politics was slightly greater than those who considered themselves conservative. In this nation that so identifies itself with individual freedom, it's hard to think of a more effective blueprint for political success and failure than the economic philosophy and message as set forth by conservatives and liberals over the past several decades: the former side accenting building from and through individual freedom and the latter side, although actually rooted in freedom, speaking instead of creating a society with social equality as an end goal.

Prior to the 1970s, though, for a substantial period, the nation was not so much under the spell of individualistic liberty. During the half century before that, indeed, Americans made stunning progress toward meeting the mutual obligations involved in a morally defensible idea of freedom, genuine freedom. The distance the nation traveled was so vast as actually to rival the advance of freedom that occurred in the era of the Founders themselves. About half of all Americans today were alive during that fifty-year period ending in the 1970s. Yet many Americans have little concept any longer of the sheer magnitude of the progress that took place in those years, along so many different dimensions, within the span of a single lifetime. It is impossible to comprehend the monumental scale of the advance and what we accomplished when free-market liberty dominates our idea of freedom.

The astonishing progress toward genuine freedom greatly lifted the lives of nearly all Americans, as will become evident over the course of this book. By the same token, the result of the ascendancy of the free-market view of freedom coupled with the ineffectiveness of the liberal challenge has been to halt that advance in its tracks and even reverse direction in key aspects. This reversal of direction over the past quarter century calls the nation into ever more serious question on fundamental moral grounds within the reasoning of freedom itself. In crucial areas here at home, not only are we failing as a society to meet the moral imperatives of individual freedom, ending in harm to many Americans. Worse, we are also doing little or nothing in the face of significantly growing problems. We are no longer moving toward but are instead moving away from being a nation that is true to the value we call our own, the value lying at the heart of our identity, individual liberty.

It is no wonder that a felt hollowness, a sense of emptiness, came to exist. We can gain new understanding about the meaning of the value that we hold most dear, what our collective story actually has been over the past, the failures of our present course, and what we must do in the future. We can recapture our feeling

of momentum. We can restore a sense of connectedness and national accomplishment here at home that is able to inspire and uplift us, that is worthy of our respect, and that serves to advance the lives of most Americans. We can do all this. For it to be possible, though, we must emancipate the present way we view individual freedom from its free-market captivity.

CHAPTER TWO

Freedom and the Promise of Economic Opportunity

Except for the language framing the abolition of slavery in the Thirteenth Amendment, the Constitution never directly touches upon any right of Americans to economic opportunity, let alone a right to opportunity that is meaningful for every person. That the Constitution contains no mention of such a right, however, does not mean that the Framers and other prominent revolutionaries did not endorse it. Many of them believed that without the availability of economic opportunity that would enable every person to build a better life, the individual liberty they understood and revered would itself be morally indefensible.

Learning how the availability of economic opportunity is necessary for individual liberty to be moral will allow us to see why the notion that every person has a right to meaningful opportunity has assumed the position of a moral bottom line in the nation's popular culture ever since the beginning. It forms the core message of the American Dream. At the level of government, as well, honoring that right carries such importance that it permeates our public policies. We now devote a substantial $1.8 trillion in taxes annually to broaden and lift opportunity. We do so through a huge complex of public programs, even in

the absence of a clear and precise stipulation to do so in the Constitution. Inherent in the moral reasoning of liberty is an obligation of society to assure decent economic opportunity for everyone. It is only through knowledge of what this societal obligation entails that the nation's bewildering array of programs begins to make sense. More important, only with that knowledge can the effort become morally comprehensible to us. The same knowledge, as well, allows us to learn precisely where the policies have outgrown our duties to one another and call for cutbacks—or, to the contrary, still remain impermissibly short and require further expansion—when judged by the moral reasoning of individual freedom and the imperatives for distributive justice contained within that reasoning.

The revolutionaries and Framers were young when they created the new nation, yet their unprecedented thinking bore such maturity as to endure for the ages. James Madison, who, more than any other person, wrote our Constitution, had yet to reach the age of forty. Thomas Jefferson composed the Declaration of Independence when he was only thirty-three years old. English-born Tom Paine, also still in his thirties, became the greatest polemist of the Revolutionary era on behalf of the cause of liberty and American nationhood. We rightly remember all of them as valiant champions of the American struggle to secure individual freedom. Political rights of speech, religion, conscience, and self-government are their legacy. None of these men is particularly remembered for the principle that individuals are free only if they have access to the economic opportunity to build a better life. Nonetheless, this principle distinguished the thinking of each of them. They each accepted that the freedom and associated right to own private property were so basic as to be essential to liberty.[1] In turn, each of them believed that the right to acquire and possess private property itself remained moral and just under liberty only if it also accompanied the continued availability of meaningful economic opportunity for all.

James Madison famously advanced the idea of separation of powers and checks and balances that became the foundation for our Constitution. His objective was to thwart mob rule by majorities that, unless checked, he believed, might ultimately overrun the right of property ownership. The right of private property ownership, along with its protection, was the bottom line for Madison. This chief aim of protecting private property seems rather distant from a concern about the level of economic opportunity available to individuals. Consider, though, the way Madison defined and thought about the right

to claim and acquire private property: "In its larger and juster meaning," Madison wrote, "[private property] embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage"* (Madison's italics).[2]

The implication of Madison's thinking here is that the moral principles of liberty that endow a person with the right to claim and acquire private property at the same time oblige that person to respect every other person's equal right to do the same. Obviously, were some people to appropriate surplus property such as to leave little to others to acquire, the equal right of individuals to acquire would begin to lose meaning. Respecting each person's right to acquire thus presumes that the opportunity to acquire at some meaningful level, by means of one's labor or otherwise, continues to exist for every individual.[3] Suppose, however, that inequalities in property did grow so extreme as to snuff out sufficient opportunity. At that point, Madison argued, public policies of government served as legitimate tools to restore a relative equality of economic conditions, as he put it, to "reduce extreme wealth towards a state of mediocrity, and raise extreme indigence toward a state of comfort."[4] For this reason, he believed that "to provide employment for the poor, and support for the indigent, is among the primary and, at the same time, not least difficult cares of the public authority."[5]

What usually remained tacit in Madison's thought Thomas Jefferson shouted from the roof tops. Individuals were morally free to acquire property in surplus, Jefferson asserted, only when adequate economic opportunity existed for all others to provide for themselves. He wrote: "Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate a natural right. The earth is given as common stock for man to labour and live on. If, for encouragement of industry we allow it to be appropriated, we must take care that other employment is furnished to those excluded from the appropriation. If we do not the fundamental right to labour the earth returns to the unemployed."[6] In Jefferson's view, the unsettled open frontier to the west had the potential to provide that opportunity for generation upon generation to come, thousands of generations, he believed. His preferred way of dealing with the obligation was for government to supply fifty acres of property from the public domain to every household that had never held that quantity of land. Fifty acres of land provided sufficient means for a family to be able to sustain itself adequately. He placed just such a provision in his draft of the Virginia Constitution of 1776,[7] foretelling the

Homestead Act, which was to become the law of the land under Lincoln. The moral reasoning behind the individual liberty to own property, in Jefferson's view, entailed a societal obligation to assure that there was enough economic opportunity for all in the form of either land or decent employment.

When Jefferson wrote the Declaration of Independence, indeed, his first draft read that "all men are created equally free and independ[e]nt." In early America, the latter word, *independent,* conveyed the sense that an individual had the capacity to attain a dignified economic standard of living through means under that individual's own control such that the individual did not come under the political will of another.[8] Jefferson removed the word *independent* in a subsequent draft, perhaps feeling that it was redundant with the word *equal*. It is clear, though, that his way of thinking about each individual's natural condition of independence and right as a free person to the means to sustain it was shared by others. The very words he used had themselves been inspired by the Virginia Declaration of Rights, written by George Mason, which the Virginia Convention had adopted a handful of weeks earlier. It proclaimed "all men are by nature equally free and independent" as the starting point for understanding the rights of individuals under freedom. Pennsylvania adopted nearly the same words in its declaration in 1776, which Benjamin Franklin helped compose, as did New Hampshire in 1784.[9]

Like Madison and Jefferson, Thomas Paine also saw the freedom of each individual to acquire property as a social right that entails a host of mutual obligations we have to each other. If the poor were disinherited as a consequence of the acquisition of others, he asserted, they deserved compensation.[10] At bottom, for him, the justice of individual freedom in the acquisition of private property presumed that some meaningful level of economic opportunity continued to exist for all, and he advanced a substantial social program carried out by government and financed by the public to assure this.[11]

Liberty and Lockean Reasoning

One important source forming the intellectual background behind the views of quite a few of the Founders, about the mutuality of obligations and obligations involving economic opportunity in particular, was the seventeenth-century philosopher John Locke. His way of thinking, along with republicanism, carried considerable weight at the time. The familiar phrase that came from Locke and other liberal writers,"life, liberty, and property," formed the

basis for Jefferson's rendition in the Declaration of Independence; similarly, the ringing proposition "All men are created equal" recalls the basic liberal premise of the equality of all human beings in nature. According to the historian Pauline Maier, "By the late eighteenth century, 'Lockean' ideas on government and revolution were accepted everywhere in America."[12] At the very least, they contributed importantly to the foundation for thinking that the revolutionaries enlarged upon and applied to eighteenth-century conditions.[13] Following in this same tradition, proponents of free-market liberty today often rely upon Locke's reasoning and frequently quote his words in their writings.[14] Because his ideas are deeply embedded in our way of thinking, through the reaches of our history and also today, it pays to take a closer look at them and the logic behind them. Doing so unearths precisely what the fundamental right of economic opportunity for every American must entail in order for it to prove morally tenable within the reasoning of liberty and, thus, why that right is so necessary for liberty to be genuine. We will also learn how this same right of opportunity mirrors the aspirations that leading Framers and other revolutionaries had for freedom. The discussion lays the ground for the coming chapters, in which we explore the foremost public policies of our nation today and how well they measure up to honoring this essential moral right of freedom and vision of the Founders.

Remember that individual liberty itself starts from the principle that every human being is to be treated as an end in his or her own right and not simply an unwilling means to the ends of others.[15] To treat other individuals as means rather than as ends in their own right without their knowing consent is to wrongfully harm them. Such treatment is immoral under liberty.

Given this principle, Locke recognized that something about private property ownership does not sit very well with a scheme of individual liberty. By granting the exclusive use of property to its owner, this right to acquire and exercise exclusive ownership of property in effect limits and interferes with the freedom of use of all other individuals with respect to that property.[16] My ownership of my car means that no one else can do anything with my car absent my permission. The question arises, therefore, as to how exclusive ownership of private property that eliminates or significantly restricts the individual liberty of all others with regard to that property can be justified within a regime of individual liberty.

Locke struggled mightily with this question. His answer has become known as the "Lockean proviso,"[17] which emphasizes the efforts or labor of the indi-

vidual coupled with a second vital condition. Here is his reasoning. Before private property existed apart from the ownership of one's own person, the earth and its natural produce were available to and owned by humankind in common,[18] what we may call the original condition. Yet when an individual plucked berries, drank water, killed and ate meat, or gathered tree limbs and grasses to build shelter and provide warmth from fire in this original condition, he or she came to own and possess those things.

What could give an individual the right to those private possessions in an original condition ruled by *common* ownership and *common* right of access? Two things, Locke argued: first, the private appropriation would have to follow from the use of one's own efforts and labor, which the individual naturally owned; second, the appropriation must leave to all others "still enough and as good . . . for their benefit, and the greatest conveniences of life they were capable to draw from it."[19] In Locke's view: "*Labor* being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others."[20] That is the Lockean proviso.

For, as long as this proviso is honored, as long as enough and as good is left for all others, no individual making a private appropriation can have harmed or injured any other. No person has been made worse off than he or she was before. Such private appropriation thereby obeys individual liberty's moral imperative that one's own actions do no wrongful harm or injury to any other. As Locke stated it: "He that leaves as much as another can make use of, does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst."[21] Similarly, "he that had as good left for his improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's labor."[22] Through this Lockean proviso, the liberty to acquire and enjoy the exclusive use of private property becomes reconciled in moral terms with the rightful liberty of all others.

Free-Market Liberty

A mutual obligation under liberty exists in Locke's reasoning, a mutual obligation involving economic opportunity. It is only with the fulfillment of this obligation that everyone, including each person who is not well off, becomes

morally obliged to respect the property rights of others and that it becomes legitimate for the state to intervene publicly, with force, to protect and preserve those property rights.

The mutual obligation is this: Each individual agrees to defer to the liberty of others to acquire and own private property through their labor and thereby agrees to obey all restrictions placed on his or her liberty with regard to that private property. At the same time, the acquisitions of others must leave for each individual an opportunity to acquire sufficient property to satisfy the condition of "enough and as good" so that no individual has been harmed or made worse off.

Many leading advocates of free-market liberty today follow the same moral argument; indeed, they refer directly to the Lockean proviso.[23] Agreeing with Locke, they believe that private acquisition and ownership must leave others enough and as good in order to remain moral under freedom. Economic opportunity must continue to be available to all to at least that degree.

What exactly does this obligation involve? What is the meaning of "enough and as good?" Here, in reasoning out the answers to these questions, is where we begin to find surprising new discoveries that enable us to grasp what liberty really entails in order to remain moral, how what it entails links with the visionary thinking of the Founders, and why the free-market view of liberty cannot be morally defended within its own frame of reasoning.

If we start with the original condition and common access, it follows that "enough and as good" must refer to—and cannot possibly mean anything less than—the situation individuals experienced in the original condition. From this, it would seem that "enough and as good" must refer to a standard no less than the subsistence living individuals could attain in the original condition. This, apparently, was Locke's sense of the meaning of "enough and as good."[24] It is also the view taken today by many free-market thinkers,[25] who point out that the modern economy produces a level of living greater for virtually all people—even those in poverty—than the living that the original condition based upon common access and ownership would have produced for them. If we continue in this line of reasoning, it follows that "enough and as good" has been left for all such individuals so that they have not been harmed or made worse off. There is indeed little in the reasoning of free-market liberty, unaided by other values such as compassion, to support an outcome any different than what naturally occurs through the laws of supply and demand of the modern free market, as long as the exchanges among all individuals have been truly voluntary and no person has

been allowed to fall beneath the survival living of the original condition. In this way of thinking, society owes individuals little more than a rudimentary education and a menial public assistance system, if that.[26]

Two fundamental issues arise here, though. For one, this account permits dire destitution comparable to that of a primitive person to result from the laws of supply and demand and to be deemed legitimate in modern society. It permits this outcome, again, as long as the exchanges among all individuals are truly voluntary and no individual is allowed to drop beneath the subsistence living of the original condition. Moreover, this account would permit that result to befall an individual involuntarily, entirely outside the individual's choice, if too little decent-paying opportunity happens to be available in the general economy—say, as the result of an economic downturn, a domestic or global trade war, a sudden surge in the supply of labor, or any number of other possible circumstances.

The free-market understanding of liberty, unaided by any other separate value such as compassion, effectively takes this position. Quite a few free-market advocates make no bones about it.[27] This is to say that unless we introduce some independent additional value such as compassion, the morality of the free-market idea of liberty turns out to reside at about the same level as does that of a survival-of-the-fittest, dog-eat-dog world; it is barely a step removed from a strict Darwinian viewpoint.

No wonder that commentators such as Daniel Yergin and Joseph Stanislaw point out, "Few people would die with the words *free markets* on their lips."[28] Or that even staunch defenders of the free market, such as President George W. Bush, have themselves observed: "The invisible hand works many miracles, but it cannot touch the human heart."[29] The need President Bush has felt to advocate what he describes as "compassionate conservatism," and his father's need before that to call for "a kinder, gentler nation," arose precisely because of the disagreeable consequences that a straight free-market idea of liberty finds acceptable and considers legitimate.

Those disagreeable consequences, the need for other bolstering values, and the inability to inspire all follow from a second and more fundamental problem with the free-market position on liberty. Free-market liberty ultimately fails to be true to the reasoning of its own logic, rendering it deeply flawed as a morally tenable view of liberty. The heart of the problem with the reasoning of the free-market view has to do with the reference point used to define "as good" in the original condition. Arbitrarily and without reason, this reference point over-

looks several crucial kinds of harm to individuals. It simply assumes them away. Acknowledging and addressing those harms results in strikingly different conclusions about what the obligation "to leave enough and as good" actually is and must be for freedom to be surely moral.

A Restated Lockean Position

To see this obligation as it actually is, we must take the time to return to a foundation for thinking about liberty at the very start, the idea of the original condition and the way Locke reasoned about it. From that much else follows. The breathtaking "self-evident truths" of the Declaration along with its transcendent words "all men are created equal," themselves, came partly from reasoning about human beings from the perspective of the natural condition, from which the truths could appear to be self-evident.[30]

In the natural condition, prior to the establishment of civil society and protection of private property ownership, individuals logically must have had common access to the earth and its resources. As Locke described the original condition, the earth was given in common for the preservation,[31] comfort,[32] and improvement[33] of all individuals. Individuals had a right of common access through their own labor not simply for their own preservation but for their own comfort and improvement as well.

A natural economic equality of sorts existed. The natural strength of an ordinary person, through the person's own labor and right of access to the common, could bring that individual a level of living that was typical to the original condition. It could do so as long as enough and as good remained to each individual with which to mix his or her labor and also because there was no money but instead only the possibility of barter exchange. Barter exchange of one's possessions along with the eventual spoilage of many commodities of the time, Locke observed, prevented any individual from accumulating much more than a modest amount that would remain unspoiled and useful to him or her.[34] As long as enough and as good remained in the common, then, the opportunity existed for all individuals of natural ability to attain normal preservation, comfort, and improvement through their labor. Everyone was equal in this regard. The original condition, as Locke understood and wrote about it, was naturally a condition not of complete economic equality but of a relative equality.[35] As a result, if individuals of ordinary ability fell below the level of preservation and comfort typical to the original condition, they did so by their own

choice, for they retained, through their labor, the opportunity of access to resources sufficient to attain preservation and comfort reasonably common to others. Quite a few of the Founders also saw the natural or original condition—and the optimal society as well—as one of freedom taking place within a condition of relative economic equality.[36]

Now, compare this situation in the original condition that I've just described, before government, with the situation that comes to exist after the establishment of civil society. Then, legal sanctioning and societal protection of private property occur, as does the loss of direct access to the commons in favor of private appropriation and money exchange. The results of such a civil society based upon private property, Locke rightly pointed out, are not limited simply to the ending of common access for all and the public protection of private property. The results generally also involve a material advance of the society well beyond what individuals could have achieved in the original condition hobbled by common access and ownership. Such material advance, bringing with it greater longevity and substantial comfort by historical standards, is often an avowed aim of societies based upon private property.

Achieving such prosperity raises the crucial question: Is an individual made worse off, or not, if most others in the society advance considerably in preservation and comfort while leaving for that individual—perhaps through lack of employment—only an opportunity enabling him or her to put together something akin to the subsistence level of preservation and comfort found in the original condition?

According to the logic of the free-market view of liberty and Locke's own personal conclusion, such an individual has not been made worse off. This is because individuals, to be worse off, need to be left with a diminished level of living in relation to what they had, or could have had, in the original condition. If individuals retain the same level of living or do better, they remain unharmed and the Lockean proviso continues to be honored.

Yet, as I am about to show, this conclusion does not follow. It is irredeemably flawed. Reasonable individuals existing at or anywhere near the material standard of the original condition in modern society, without access to the opportunity to do otherwise, can rightly consider themselves worse off in four decisive ways. These ways have to do with the access they have—or, more to the point, no longer have—to the opportunity to attain equal economic standing, inclusion, self-improvement, and self-rule. Taking these considerations into account, and correcting for them, leads to an entirely different conception of

the obligations we have to each other under freedom with respect to economic opportunity and the role of the public sphere in assuring the availability of that opportunity—a conception reminiscent of the line of thinking suggested earlier in the views of Madison, Jefferson, and Paine.

Four Considerations

First, there is the issue of the individual's status of relative economic equality, and especially his or her freedom of control over that status. Poverty tends to bring diminished status in society. I often hear hushed reproaches about free-loading and sponging or being a deadbeat by one or another person standing in line when an individual hands food stamps to the cashier to buy groceries in the supermarket. While waiting on line recently, I overheard the cashier describing customers who paid with food stamps as "disgusting." It's no wonder, as Associated Press journalist Emily Gersema points out, that poor people who use food stamps often "feel stigmatized in relying on the government to pick up part of their food bills."[37]

Many low-paid workers feel the same. Cristina Gomez earns $8.20 per hour. That was her pay at age forty, after working as a clothes sorter for thirteen years at the Cintas Corporation. She was asked about her company: "The company's managers told us, 'You should be proud to work for Cintas,' but I'm embarrassed," she responded. "I'm ashamed to admit I earn just $8.20 an hour."[38] The wages she is paid have left her feeling demeaned, second rate. We all know, too, how run-down and dilapidated housing tends to raise eyebrows about the people residing in that housing. We've heard people say, "I wouldn't be caught dead in that neighborhood." In my own interviews of individuals unable to afford goods that most others in society consider standard, even necessities, the interviewees tell me that their condition profoundly affects how they see themselves. Comments like "I'm worthless," or "I don't deserve to live," or "I'd be better off dead," or, like Cristina Gomez, "I'm ashamed" reveal the lesser status that they feel.[39]

The core issue here, though, is about neither the poverty of these individuals nor the status they feel but whether the opportunity and hope to be a relative economic equal are or are not available to them. In a civil society based upon a market economy, we know that no necessary tie exists between the number of decent-paying jobs available and the number of workers who need such jobs. A free-market economy is expected to function efficiently based upon the laws of supply and demand. Absent external intervention, it will not necessarily arrive

at a condition of relative economic equality in which individuals are able to be employed in jobs paying wages and benefits sufficient at least to support a minimally decent standard of living. Chapters to come will amply demonstrate, in fact, that many millions of full-time workers in our economy occupy jobs today whose wages cannot support a minimally decent living, wages that have dutifully followed the laws of supply and demand. Millions more have taken part-time jobs because adequate full-time work is unavailable. This is not to mention the millions beyond all of these workers who are unemployed and without jobs. In a free-market economy, individuals may or may not have access through their labor to the means to attain a standard of living similar to that of most others.

By contrast, under the original condition, an individual always had access to a standard of living similar to that of most others. Such an individual (I will use the masculine personal pronoun, for the sake of simplicity) either enjoyed that standard already through his labor, or, if he did not, he retained the opportunity of access in the commons to sufficient resources to reach that standard of living, through his labor, if he chose. In this crucial respect, as we have seen, he was a relative equal in the original condition. Now, within civil society, this same individual may be closed out. The opportunity for the individual to maintain a relative equality common to most others, through his own labor, may well not exist at all or may disappear and no longer exist. The individual can thus lose his status of relative equality, involuntarily, perhaps for long periods of time or forever. He is surely reasonable to consider himself worse off in this particular regard, if it is indeed true that the opportunity to attain the level of living of a relative equal in the civil society does not remain available to him.

Akin to this is a second consideration. According to Locke, not to mention a host of others, humans are naturally inclined toward sociability and fellowship.[40] Because we are so inclined, it is quite natural for us to see ourselves in relation to others, as belonging or not. Think about walking by a ritzy hotel where everybody is elegantly dressed and very well manicured. Clad casually, you are instantaneously aware you don't belong there. You feel like an outsider, a stranger. The poor who are unable to afford a minimally decent living, unable to attain the goods most others take for granted as standard, are apt to feel that same way regarding the society in general, to feel out of place, that they don't belong. If preservation and comfort progress significantly for others, but an individual does not have the opportunity to join in this and belong, he or she is worse off in this respect than under the original condition, where access to such

opportunity did exist. Moreover, even if the surrounding neighborhood contains other poor with whom that individual can have fellowship, he or she along with those other poor continue to remain outsiders within the larger society. With the coming of television, in fact, the nation has increasingly grown to rival or surpass the neighborhood as the prime reference point for common social norms and living standards.

Third, one of the primary purposes of both work and common access under the original condition, according to Locke, was for the individual to be able to improve his or her material well-being. Embedded in freedom in the original condition is the presumption of improvement through improved work, for an individual received the whole of the return from his or her own work. Producing largely for him- or herself, any individual whose work improved would by definition attain an equivalent improvement in material well-being.[41] No such tie necessarily exists in a market economy, though. Should the supply of workers with a certain skill increase, workers who have improved their own skill may find that their wage actually falls. The value of a high school education has declined for this reason. Thirty years ago, workers with only a high school degree often got paid a higher real wage than workers did later on who had gone beyond high school and had gotten some college education.[42] A substantial increase in the general supply of labor will have the same effect of reducing the value of labor relative to its skill. The supply of labor can undergo abrupt, prolonged growth for a variety of reasons, such as when a baby boom generation reaches adulthood, or second earners from families seek jobs in far greater numbers, or there is a surge in immigration. If a significantly increased supply of labor occurs in a market economy, stagnant wages and real wage declines are likely to occur, even for those workers who do better on the job and improve their productivity. As we will see, those are conditions that a *majority* of American workers have experienced during much of the past three decades.

Fourth, with direct access to the resources of the commons, no able individual in the natural or original condition needed to be subservient to any other through economic dependence for the means to a living. For reasons described momentarily, a condition of economic independence was central to the Founders' own ideas about freedom. As Thomas Paine succinctly put it, "Freedom is destroyed by dependence."[43] In the original condition, each person had direct access to the resources essential to provide preservation and comfort and maintain the economic independence necessary for self-rule. No person was made to depend for that access upon any other person.[44]

Implications

We can now return to the argument set forth earlier that, under the morality of liberty, the obligation of civil society to individuals is nothing more than the subsistence living obtainable in the original condition or something reasonably close to it. Using the proviso's own logic, we can see that this proposition is false.[45] I have just spoken of four goods—let us call them associational goods—available to individuals in the original condition that civil society operating under a regime of private property may well place in jeopardy: the opportunity for equal economic standing, for inclusion, for self-improvement, and for self-rule. It is clear that any individual in civil society who is reduced to the same level of living as was possible in the original condition yet is now worse off with respect to any or all of these associational goods is, by definition, worse off than he would have been in the original condition (again, for simplicity, I resort to masculine pronouns). It follows that a regime of private property under liberty is obligated to assure to each such individual greater opportunity than those same individuals would have had in the original condition.

What minimum threshold of economic opportunity in a market economy, as compared with the original condition, is required to fulfill the proviso of leaving enough and as good for all? We are presuming here that individual freedom is the primary value. A starting assumption of individual liberty is that remaining free, and equal in one's freedom, holds the highest value in the lives of all individuals. Because equal freedom is paramount, its loss may carry such importance that nothing else at all could compensate for it. Consider an individual in the original condition who has a life span limited, say, to no more than thirty or thirty-five years, who must gather firewood for cooking, light, and warmth, and who can travel no more than a handful of miles. Then consider the same individual in civil society who is and feels himself impoverished yet who can expect a life span of seventy years, who usually has electricity for cooking, light, and warmth, and who can travel a long distance using the car he owns, assuming it is in working order. Ultimately one must ask, though, how much are the additional thirty-five years of life and far more substantial material benefits worth to an individual if everywhere the individual goes most people look down upon him as an inferior and stigmatize him, he feels himself an outsider and dependent, and he is unable to change those conditions or make a significantly better life and position for himself in society even if he improves the quality of his work?

If equal freedom is paramount, we can have no certainty that individuals who have lost the opportunity to attain these associational goods have been left unharmed, notwithstanding the other benefits civil society brings. The greater longevity and other material benefits of civil society do not surely compensate for the loss. The only way to be certain that civil society leaves individuals unharmed is for opportunity sufficient to attain the associational goods to continue to exist for all. Using the Lockean reasoning of the proviso, this is to say, a society for which individual freedom is paramount must become increasingly morally questionable the further that the society allows economic opportunity to drop below the threshold necessary for individuals to attain the associational goods. I will attempt to spell this threshold out in specific practical terms, and show how it yields new understanding about American public policy of the past century, in the next chapter.

A tempting response is the claim that most Americans who are poor today are quite well off when their living conditions are compared with those of the many millions of people now on the edge of starvation elsewhere. Consider places such as Ethiopia, Zambia, Pakistan, or Ecuador. Or consider even living standards within our own nation only about a century ago during the days when Upton Sinclair wrote *The Jungle*. Because most of our poor have better material conditions in all these comparisons, it would seem obvious that they must have been left "enough and as good." Perhaps they should even feel fortunate.

The difficulty with this perspective is that it ignores the associational goods such as those of equal economic standing, inclusion, and self-improvement. Because of the importance that the loss of the associational goods will reasonably have to individuals who view freedom—and thus their own equal freedom—as paramount, the minimum threshold of economic opportunity necessary for individuals to be surely free in the logic of the proviso must gain definition from within the context of the standards of an individual's own society and economy, not primarily from those of other societies elsewhere in the world or of one's own society in the past. With respect to the associational goods, individuals necessarily think in terms of their own society and day, for that is where they live and function. In this regard, as a result, they must be understood and viewed within the context of the norms and standards that exist in their own society, not some foreign set of circumstances around the globe or during the past.

Does this perspective give too much favor to the less advantaged? What

about the liberty rights of everyone else? Is it possible to assure the necessary economic opportunity for all, including the taxation and redistribution that that assurance may require, without encroaching on any other person's liberty, such as the liberty of those who are better off? Just as the establishment of civil society must not worsen the situation of the less advantaged, it may not worsen the situation of the more advantaged and harm them, either. Under the moral code of freedom, establishing a regime of private property under liberty must not worsen anyone's position. It must be *neutral* in this regard.

It is usually taken as a given, properly so, that the establishment of a regime of private property ownership under liberty will generate greater prosperity as compared with what will occur under common ownership and access as prevailed in the original condition. Regimes of private property can be so prosperous that immense advances in material well-being have occurred over the years even in places that have long had public sectors substantially greater than our own. We call them social welfare states. The more advantaged participate in this greater prosperity. Beyond that, as the more advantaged, they presumably participate in the prosperity more than anyone else as long as the system of taxation remains fair and equitable. If this is so, it follows that replacing the original condition with a regime of private property under liberty, one containing a public sector sizable enough to assure the right of access to a reasonable threshold of economic opportunity for all, operates not simply to the benefit of the more advantaged relative to their situation in original condition. It will likely operate in their favor as much as or more than it benefits the less advantaged.

Of course, the advantaged might benefit still more, perhaps considerably more, from an unrestricted free market. Isn't this germane? Isn't something being taken from individuals if they gain less benefit from a system that assures a minimum threshold of opportunity for all than they would gain from another system, such as an unrestricted free market? The proviso holds that in acquiring property, enough and as good must be left for all others. If not, wrongful harm is done to others, which is illegitimate under liberty. A minimum threshold of opportunity necessary to assure that "enough and as good" is left for all others, therefore, must be satisfied as a precondition for private acquisition beyond the threshold to be surely moral under liberty. It is a requirement of individual liberty, not a moral transgression, for society to reclaim some fraction of the acquisition that goes beyond the minimum threshold when such action is necessary to assure that the minimum threshold of opportunity is available for

all and no other less restrictive action will suffice. Substantial inequalities of outcome are permissible under liberty, without limit, so long as the minimum threshold of opportunity continues to be available for all.

Consequently, the establishment of a regime of private property under liberty that contains a right of access to the minimum threshold of economic opportunity works to the advantage of each individual and harms no one relative to his or her situation and moral rights in the original condition. Nor does it illegitimately restrict any individual's liberty to acquire. We cannot say the same for the pure free-market view—the view that society's obligation rises no further than assuring the living obtainable in the original condition. That view clearly fails on logical grounds, as we have seen. Because the restated Lockean position that I've described works to the advantage of every individual relative to the individual's situation in the original condition, it protects every person's freedom.

As a result, there is only one way for civil society having private property ownership to rest on moral foundations that are unquestionably secure, by Locke's and the proviso's own process of moral reasoning. That way is for the society to assure individuals access to the minimum threshold of economic opportunity—that is, access to the opportunity enabling them, through their labor amid a choice of openings, to attain at least a minimally decent living within the norms of their society and to be able to improve their living by improving their work.[46] Safeguarding anything that falls significantly below this minimum threshold of opportunity must begin to raise serious issues about whether such a regime is in fact harmful to people and thus consistent with the liberty of every person.

I call economic opportunity that meets the minimum threshold "adequate" opportunity. Adequate opportunity does not demand equality or equal outcomes in the distribution of income, not in any way. It is important that this be clear.

At the same time, adequate opportunity does and must go further than assuring equal opportunity. When opportunity is not ample enough, equal opportunity will still leave some persons out. Where one hundred individuals need jobs and only eighty jobs exist, assuring completely equal opportunity to all will still leave twenty people without jobs. In order to meet the minimum threshold, a society must assure not only that individuals are equally treated in the employment, consumer, and other markets but, in addition, that economic opportunity sufficient to meet the threshold is available for all. That is, the

level of opportunity that is available must enable individuals to reach at least tolerably near to the standard of living of the day through customary amounts of work and to be able to improve their standard of living by improving the quality of their work.[47] Also, the opportunity must provide genuine choices among a number of different job openings in order to prevent an individual from becoming dependent upon or subject to the caprice of any single or few employers.[48]

Finally, the society would need to go one step further. It would need to make provision for individuals who for reasons beyond their control are physically or mentally unable to provide for themselves. If life is a necessary condition for liberty, and if individual liberty is the highest value, then those individuals who do not have the ability to sustain their life and thus their liberty, for reasons beyond their control, must have access to the means to do so. Locke himself, though for other reasons, insisted on the provision of public relief to such individuals.[49]

Locke, as did many of the Founders after him, often used the language of contract. Contract language articulates the type of thinking involved when an individual enters into a binding agreement with others. Individuals coming out of the original condition and forming a civil society under liberty were imagined to do so explicitly or implicitly through contractual thinking, as if they were creating a social contract among themselves.

We can put Locke's moral reasoning about individual liberty as I have restated it into the language of social contract. In this language, all parties coming out of the original condition and forming civil society through contract would be reasonable to want fair assurance that they will not be harmed by others—as they themselves agree to refrain from harming others—in establishing a system that publicly sanctions and protects private property acquisition and ownership. This assurance would permit and legally enforce any income inequalities that arise through the free actions of individuals and would oblige all individuals to respect those inequalities. It would do so as long as the economic opportunity to attain a minimally decent living through one's labor—including a sufficient choice of openings necessary to remain a relative equal—and the ability to improve one's condition by improving one's labor continue to exist for everyone.[50] In addition, individual parties to a social contract would be reasonable to settle upon some fair assurance of mutual aid if individuals involuntarily become physically or mentally unable, a condition that could afflict any individual randomly, or any individual's children, at any time in life.

The Restatement and the Thinking of the Founders

The minimum threshold for adequate economic opportunity and freedom that I have described, in fact, would be familiar to the Founders. It is similar to what Jefferson considered the very starting point for thinking about rights coming from nature or the natural condition, as he indicated in 1776 in his original draft of the Declaration of Independence with the words "all men are created equally free and independ[e]nt." Quite a few of the states adopted substantially the same wording—"by nature [or, "born"] equally free and independent"—in their own declarations of basic rights. As observed earlier, the idea of independence conveyed that individuals were able to attain a dignified economic standard of living through means under their own control enabling them to remain free of the political will of any other person.[51] Many of the Framers and other revolutionaries—Madison, Jefferson, and Paine included among them—saw a state of relative economic equality based upon continued access to adequate opportunity for all citizens to attain a dignified living as their idea of the quintessential, maximally free society.[52]

In vital respects, that is, Lockean reasoning as I have restated it describes a perspective with which the nation's Framers and other revolutionaries were deeply sympathetic. It does so both in its understanding of liberty as involving substantial obligations to one another in order to be moral and in the preference many Framers and other revolutionaries had, as a vision, for a society built upon economic opportunity able to bring a dignified standard for all, a society that advanced relative economic equality of that kind. In effect, the restatement connects the Lockean liberal and the republican views that the Founders held about freedom.

Recall the idea of independence, as it was understood and expressed in the revolutionaries' declarations of rights, traced back to the natural condition within the liberal tradition of thinking, but it also mirrored republican thinking. In fact, the most immediate focus of the thinking of the Framers and other revolutionaries was independence and dependency as they related to republican ideas of virtue. From a republican perspective, the issue had to do with the ability and time an individual had to be able to think independently, without coming under the will of another, which required a certain level of economic independence. Economic independence, the reasoning went, grew from ownership of land sufficient to sustain an individual in dignity, through a confined amount of that individual's work, or from personal wealth. Such independence

enabled an individual to provide a decent living that left time for learning, reflection, and other endeavors, particularly civic participation, and also enabled the individual to avoid being subject to the coercion of another through economic dependence.

Those same issues of independence, however, existed and needed to be resolved in the process of coming out of the original condition. As a result, adequate opportunity, derived from the original condition, speaks to each of the concerns. Adequacy of opportunity stresses the ability to attain a dignified living standard through a choice of openings and positions sufficient to address issues of economic dependency and through an ordinary input of work leaving time for other endeavors, among them social and political involvement.[53] In this manner, it resembles what many Founders had in mind about freedom whether viewed from a liberal or a republican vantage point. It captures the crux of the meaning and aims of freedom the Founders were speaking about, in concept, although it obviously remained a good distance from the routine practice of the day.

That the idea of adequacy of opportunity parallels views the Founders held about freedom marks just one of its virtues. The same idea also describes what a society *must* do in the economic realm, logically, in order to be and remain morally tenable within the traditional Lockean way of reasoning about individual freedom—the way of reasoning to which the Declaration of Independence and similar documents heralding the new nation appeal. Because this idea obeys the historical Lockean reasoning process and echoes views about freedom commonly held by the Founders themselves, I call it "genuine" freedom. In addition, with its Lockean foundations, it builds on the same moral tradition that many leading advocates of free-market liberty draw on today. Yet it does so using sustainable as opposed to indefensible reasoning. That the restatement has sustainable moral grounding, unlike free-market liberty, while incorporating the essence of many of the Founders' own conceptions of freedom provides compelling reason for it to serve as a guiding vision for our thinking about freedom.

Mandate for Public Policy

Viewed through the lens of this guiding vision, a civil society that sanctions and protects private property ownership must carry out a crucially different social policy than the night-watchman or minimalist one associated with the free-market perspective on liberty unaided by any separate value such as compassion. A rudimentary education and a menial assistance system are the most

that that unaided perspective can justify.[54] To be sustainable within the moral reasoning of liberty, which is necessary for individuals to be genuinely free, civil society has a substantially greater obligation. That obligation is to assure individuals the continued availability of economic opportunity to attain a minimally decent living through work,[55] including true choices of situations, and to improve their living by improving their work. The obligation equally includes an assurance of mutual assistance for individuals who are involuntarily physically or mentally unable.

During our first century as a nation, with a seemingly endless frontier open to the west and ample land available to settle for those struggling elsewhere, it was possible to believe that the opportunity to attain a decent living through one's own means was available to all able individuals willing to pursue it and persevere. Many people simply assumed its existence.[56] The American frontier came to a close nearly a century ago. Certainly by then, if not well before, this kind of opportunity had vanished. Americans seeking opportunity for a new life on the frontier found themselves facing the barbed wire fence of private ownership. We will learn in the coming chapter that the social policies the United States has actually established over the past century (as well as a good part of the $1.8 trillion devoted yearly to social policy at the close of the millennium) incorporate many of the actions it takes in an effort to honor the obligations necessary for freedom to be genuine in a modern economy with no open frontier. Those social policies reflect the contours of action genuine freedom calls for with an astonishing degree of accuracy. Substantial affirmative government is required in the modern context in order for freedom to be made genuine and, so, morally defensible within its own frame of reasoning. Where the actions of government fail today, indeed, it is almost always because they remain too timid and fall short of meeting the obligations of genuine freedom rather than because they have gone to excess.

Some Important Counterarguments

Before turning to those policies and how they speak to the obligations necessary for freedom, I want to complete the present discussion by addressing a variety of objections not yet considered which can be raised against the conclusions I have reached about the moral reasoning of freedom and the distributive justice it calls for. Here I will take up objections that attempt to undermine the conclusions, on principle. Such objections attempt to refute the kind and level of economic opportunity that I assert are required as a threshold for individual

freedom to be morally defensible. Or they claim that implementation of that standard would violate other basic principles or ethical norms crucial to liberty. In later chapters I look at practical counterarguments about results in the real world. Those practical counterarguments contend that both the kind and level of economic opportunity in the nation now already satisfactorily meet the threshold that individual liberty calls for or, if they do not, that the size, burdensomeness, and perverse incentives of government are the prime reasons why they do not.

The Free Market with Compassion Added

Readers may be wondering what moral problem, if any, faces an alternative view that I have already raised. This is the view saying that free-market liberty is fine if we supplement it with some other value or values, such as compassion, in order to enable society to do more to reach out to individuals in need. We know the view today as "compassionate conservatism," a view whose appeal has widened in recent years. Yet a free-market perspective that adds compassion—or any other value—simultaneously affirms that free-market liberty itself is inadequate. In essence, holders of this view are trying to bridge the gap between freedom and what they consider to be moral. It is good to be compassionate, to be sure. But compassion carries no sense of obligation, whereas liberty rights *do* involve obligation. We are not free to abridge another's liberty. Compassionate liberty, in effect, leaves it up to the voluntary actions of individuals as to whether they and the larger society will respect legitimate liberty rights of other individuals—say, the right to adequate economic opportunity. A position that depends upon compassion accepts the possibility that society will not enforce some individuals' legitimate rights, and that they may not be upheld, unless the level of compassion happens to be there to do so. Yet that places those individuals in a position akin to supplicants, having to hope that others will respect their rights out of compassion, perhaps even having to beg others for their pity, rather than being able to assert and legitimately expect enforcement of their own rights. Leaving the enforcement of liberty rights up to the compassion of others—whether to individuals or majorities of the public—is a fundamental violation of principles of liberty. If something is morally a liberty right, it deserves enforcement as a liberty right irrespective of compassion.

Is Leaving "Enough and as Good" Truly Necessary?

One way of resolving this problem facing compassionate liberty is to claim that no legitimate right under liberty to be left "enough and as good" ever

existed in the first place. Is it truly necessary for a society to meet this standard of economic opportunity in order for private property acquisition and ownership to be and remain moral under liberty? Some observers might argue that the liberty right of common access under the original condition could never have actually involved the right to be left enough and as good. This is because common access among free individuals ordinarily results in a substantial overuse of resources by self-seeking individuals acting to further their own ends. Sooner or later, such overuse leaves little or nothing for others, perhaps for anyone. That result is known as "the tragedy of the commons."[57] Consequently, one can speculate that common access of free individuals in the original condition, who operated in their own self-interests with no regard for others, ultimately would have led to starvation for some or many individuals, a dreary and dismal existence in the best of times.[58] If this were to happen, then a regime of common access would not have left "enough and as good" for others, making some private property–owning arrangement necessary in order to avoid starvation for most, if not all.

Yet the argument here is speculation. There is no reason to believe that regimes of common access must result in overuse and starvation, since there are historical examples to the contrary. More important, the argument presumes that a situation of amorality rather than morality exists in the original condition. By contrast, I presuppose that Americans desire to be moral. That raises the question of what is necessary morally to move from common access in the original condition to private property ownership and its public protection in civil society. Leading proponents of free-market liberty themselves acknowledge that the proviso or something similar to it is required, coming from a position of common access, in order for individual liberty to coexist with private property ownership on moral grounds.[59] There is no answer otherwise as to why individuals are morally obliged to respect one another's property rights amid inequalities when common ownership once was each person's right. While many free-market proponents employ the proviso as a moral reference point, however, we have seen that only genuine freedom actually follows from the reasoning process that that proviso involves.

At the same time, it is true that not all free-market proponents refer to the proviso. Some do not, offering other principles to defend their argument. The Nobel Prize–winning economist Milton Friedman, for example, claims that conditions of voluntary economic exchange and personal responsibility must be dominant in order for democracies to avert political tyranny. That is, democracies require an ascendant free market in order to succeed. Yet the existence of

large-scale collectivist social welfare systems that have supported and continue to support vibrant democracies raises questions about this view. Friedman himself accepts governmental intervention to deal with poverty and human need on considerably larger scale than do advocates of free-market liberty who refer to the proviso. This is to say that adherents of free-market liberty may call for broader collective action in public assistance, but they are likely to do so outside the reasoning of the proviso. Moreover, the defense those proponents offer for broader governmental action then itself fails to hold up within the perspective of free-market reasoning. Friedman, for example, calls for a form of guaranteed income. He does so arguing that poverty is, in effect, a market failure and so, within a free-market perspective, an appropriate area for governmental intervention. With due respect to Friedman, though, it is clear that poverty is not a market failure in the sense that free-market advocates or economists ordinarily use the term or even in the sense that he uses the term.[60]

One of the staunchest defenses for the free-market view of liberty independent of the proviso is that of Friedrich Hayek. Hayek argues that voluntary exchange through the free market is the best and indeed only feasible way to deal with the staggering amount of information surrounding what thousands of dispersed people individually want; the differing values they have that often defy reconciliation; what can be supplied and the cost of producing it; and the dynamic changes that endlessly occur in all those factors. Any centralized governmental solution must end up imposing its own values, not those that individual citizens would choose, which is why Hayek titled the book that became his most famous *The Road to Serfdom*.[61] He saw the centralized planning of the modern state to be just such a road.

This defense Hayek gives for the free-market notion of freedom is instrumental, of course, not logical and so necessarily enduring. Were the capacity for information processing to become possible through electronic or other means, the objection he gives to centralized planning through the state could well mostly evaporate, at least on those grounds.

More important, the information that markets process so marvelously is based on how many dollars individuals have, not on the individuals themselves. An individual with no job and no dollars will go unrecorded in the production and consumer markets. There is indeed little in the way of any spelled-out moral bottom line in Hayek's argument regarding conditions of living for individuals and families or collective actions by society that might be needed to attain them.[62] Consider the following passage suggesting what his

idea of freedom embraced: "Whether or not I am my own master and can follow my own choice and whether the possibilities from which I must choose are many or few are two entirely different questions. . . . Even if the threat of starvation to me and perhaps to my family impels me to accept a distasteful job at a very low wage, even if I am 'at the mercy' of the only man willing to employ me, I am not coerced by him or anybody else."[63]

That condition, however, would offend much of the Founders' thinking about what freedom is and requires as well as the sensibilities of many Americans about what constitutes a morally decent society. It leaves open even within Hayek's reasoning the question of why the availability of a job paying a wage so low as to keep one *below* starvation would not still constitute a choice, since the individual could live somewhat longer with than without the job. Is a job permitting one month longer of survival the proper measure of the availability of choice, or is it six months, a year, five years, or the ability to attain a life span normal to others (which could require meeting all necessities at adequate levels for today, including health care)? The issue of longevity effectively brings us back to the question of what is a proper bottom line (as well as the appropriate way to figure it out) that justifies each person's obligation to respect the liberty right of others to own and control property. That is the function of the proviso. Hayek ultimately leaves that question in abeyance.

Utilitarianism

Perhaps Hayek is right in another way, however. Perhaps overlooking the plight of some individuals in the present might work to the benefit of many more individuals, possibly all individuals, in the future. Consider, for example, the extraordinary prosperity that we have today. Virtually all of us share in it to one degree or another. Most Americans who are poor today are better off than the *average* American a century ago. Suppose that this present prosperity had been made possible only through vast economic inequality that involved dire poverty at some previous time in history in order to be able to gather the massive capital resources necessary to generate broader prosperity.

Yet there are plenty of disputing facts. Among those facts is the existence of highly prosperous Western industrial nations that have had substantial public sectors, including large programs of income redistribution, for a very long time now. A substantial proportion of the prosperity of those nations, measured by the GNP, occurred *after* their public sectors had already grown very large.[64]

All the same, although nations with low poverty rates might attain material

prosperity, economies with greater inequality and higher rates of poverty possibly tend to grow faster and become the most prosperous. Among advanced nations, the United States had the fastest-growing economy in the industrialized West during the 1990s, and it also had comparatively high levels of inequality and poverty. The situation is complex, though. Despite having greater inequality and poverty, the economy of the United States grew more slowly than did many other advanced economies in the 1970s and again in the 1980s. So, again, the premise about the connection between inequality and stronger economic growth remains empirically unclear.

Yet, if we assume its truth, would that rescue the objection? Even if higher poverty rates did lead to stronger economic growth, that result does not make it acceptable to abandon liberties of some individuals in order to advantage the lives of others. Suppose, however, that every individual became better off through that economic growth. Suppose that economic growth built upon higher rates of poverty and inequality helped not only the nonpoor but also all the poor, that is, everyone in the end—even those who continue to be poor but with a better standard of living. Again, of course, it is empirically disputable that poverty for some is required in order to attain overall economic growth that lifts them and all others. In addition, such prosperity does not and cannot unquestionably advantage all. It does not and cannot as long as that prosperity leaves some or many individuals still in poverty according to the contemporary standard of living, without opportunity through work to attain the minimum living of a relative economic equal in the society. To leave individuals materially better off yet still in poverty—marginalized, reduced to inferiority in the society, and without sufficient opportunity to change their condition—is to cause them possible harm as compared with retaining the opportunity to be a relative equal, which logically was once their liberty. Opportunity adequate to attain the minimum living of a relative equal must remain for the conclusion to be surely true that individuals have not been harmed.

The Right to Exit

Had those individuals really been harmed, though, they remained perfectly free to move elsewhere, to other countries. This is perhaps the ultimate answer to the necessity of leaving "enough and as good." Let people be free to move. Those free to move who decide to stay imply that they willingly accept their position.

Of course, individuals are not now necessarily free to move. Other countries impose their own legal regulations. Those regulations restrict foreigners with respect to both the right to extended residency and, if extended residency is granted, the right to employment.

But suppose individuals were truly free to move. Suppose they faced no legal restrictions inhibiting them from moving to other countries. Even then, should individuals forbear doing so, it offers no evidence that they willingly accept their position or that they have been treated properly in the place in which they now live. At the very best, it merely means that the individuals in question have not experienced harms that were great enough to outweigh the various transaction costs involved in moving to another country, which are likely to be heavy ones for most households. Among others, those costs often involve crushing monetary outlays and agonizing ruptures with family. That many millions of blacks chose to stay in the South during the long years of segregation and Jim Crow, even though they were free to leave, represents no indication that they were being properly treated under liberty.

Equity

One of the fundamental objections to the guiding vision of freedom as I have described it is the charge that it violates elementary principles of reciprocity and equity. It violates those principles, the objection points out, because it would entitle individuals who work full-time to the minimally socially decent living of a relative economic equal without regard to the value of their work to others.[65]

This objection questions whether the social contributions that low-wage individuals have made through work necessarily merit the minimally socially decent living standard of a relative economic equal in return. What about a worker who flips hamburgers at McDonald's, for example? Kenneth Shank, a securities analyst for the Northern Trust Company in Chicago, worked briefly at McDonald's in 1999 in order to learn about innovations taking place at the restaurants. The experience on the job surprised and sobered him. "This is stressful," he observed. "The work's much harder than sitting and thinking about things in my office."[66]

Here's a straightforward rule of thumb of equity that I think is worthy. Year-round full-time work devoted to jobs whose products and services many members of the public want and depend upon but do not wish to provide or do for

themselves can make a reasonable case, on grounds of equity, of being worthy of a minimally decent living standard. Many of those jobs are also physically demanding ones.[67] The rule of thumb I've described embraces an enormous array of jobs, from all walks of life. They include sales clerks, machine operators, grounds-keepers, security guards, farmhands, pre-school teachers, nurses' aides and medical assistants, cleaners in our homes, hotels, and motels, and many more.

That these jobs are all worthy of at least a minimally socially decent living—that is, a living that is minimally adequate in contemporary terms—is a reasonable claim. No less a free-market advocate than Adam Smith himself had this to say: "It is but equity . . . that they who feed, clothe and lodge the whole body of the people, should have such a share of the produce of their own labor as to be themselves tolerably well fed, clothed and lodged."[68] In using the word *tolerably,* by the way, Smith meant as measured by the standards contemporary to that day and that society.

Coercion of Taxpayers

A final line of argument addressing basic principle starts here. It builds from the principle of liberty that individuals own their own labor. They thus have a right to the fruits of that labor. Yet maintaining economic opportunity for all sufficient to meet an "enough and as good" standard that is meaningful is likely to call for public resources. If so, it will require taxation to muster those resources. There will have to be taxation on the return from an individual's labor and the redistribution of those resources to others. Wouldn't such coercive taxation itself, though, amount to violating the right of liberty that all of us have to our property and the fruits of our own labor? Wouldn't it constitute a wrongful taking of property, akin to stealing?

Advocates of liberty—including free-market liberty—view taxation as no violation of liberty if it is expressly for a purpose that is necessary to protect liberty.[69] Taxes on the fruits of one's labor to support police or penal and adjudications systems, or to establish national defense, or to operate a system of voting for elections, or to operate the political institutions themselves are examples. If the continued availability of the opportunity to be a relative economic equal through one's labor is in fact a legitimate part of individual liberty, then taxes required for that purpose are morally, and logically, no different than taxes used to protect and assure other liberties.

Conclusion

This, then, is how the argument for genuine freedom responds to an array of objections on principle. Further objections are discussed in the following chapters. Describing the argument, as this chapter has done, begins to reveal the rich fabric of obligations we have under liberty, toward one another and the collective society as a whole. Liberty incorporates these obligations because it must. If it does not embrace them, freedom following the historical tradition of Locke and many of the Founders becomes unsustainable within its own way of moral reasoning. Yet only if freedom is sustainable within its own logic can it be surely moral. And, only freedom that is surely moral can gain the power to inspire our true respect and admiration. Genuine freedom incorporates the obligations necessary to be morally sustainable; free-market liberty does not.

If we fail to grasp this, we cannot understand what individual liberty really is about or what it requires from us. To have this understanding, on the other hand, opens us to new vistas, as the coming chapters show. For one, much of what we have actually done collectively as a society over the past three or four generations, until recently, comes to life and makes sense through this idea of freedom while often remaining inexplicable and indeed indefensible through the free-market view that pervades our idea of freedom today. Without the perspective of genuine freedom, a good part of the nation's story over the past three or four generations appears alien at least in terms of the cherished value with which we most deeply identify as a nation. Only through understanding what we have done, in turn, can we have any way of comprehending the true nature of the voyage we have taken toward freedom as a nation and what it has involved. Only in this way, too, can we grasp where freedom as an end or destination itself actually lies, or the distance we still have left to travel, or the route that is needed to take us there. And appreciation for what freedom genuinely involves allows us to do something else as well. It enables us to see how resolution of the age-old conflict that has characterized America from the beginning—the conflict between, on the one hand, an emphasis on freedom as individual autonomy and pursuing individual self-interest and, on the other, the desire many have for a common higher public purpose and unifying bonds connecting us all together—actually lies within a fuller understanding of the morality of liberty itself.

CHAPTER THREE

Guidelines for American Social Policy

On a flight to the east coast, not long ago, I sat next to a businessman from the suburbs of Chicago. I will call him Frank Vitale. He was nearing retirement, yet his smooth, rectangular face looked almost boyish. Only a hint of gray in his wiry black hair, just at the temples, betrayed his age. His smile was bright enough to lift my mood. We got to talking, and as time went on, I found Frank telling me his story. He grew up in a poverty-stricken family in inner Chicago, both his mother and father having come to this country from Italy when they were in their early twenties. Neither of his parents had gone past the sixth grade. He himself had dropped out of high school in the eleventh grade, later getting his GED. At age seventeen, he had taken an assembly-line job, earning the minimum wage. Holding a bourbon on ice in his left hand, relaxed, he described his brutal early years as a leather worker, living from hand to mouth, and recounted the injuries he sustained on the job that sometimes forced him to lose weeks of work, periodically thrusting him onto the streets and into homelessness. It's in the past now. All of it is distant memory. His luck began to improve in his late twenties when he got a job as a cashier and sales clerk, which enabled him to earn commissions. On the day of his thirty-fourth birthday, his supervisor left for

another job, and Frank moved up to managing his department. Today he's the boss of a string of chain stories, owning one of them himself. He has a spacious home and drives a Lincoln. Three of his four children have completed college and have growing families of their own. Frank's eyes sparkled as he reminisced, a man proud of what he had accomplished, his satisfaction immense, and rightly so.

Frank's life tells a quintessentially American story, an inspiring and yet a familiar story. The story of advance through opportunity is, at bottom, a story about freedom. We can see this simply through the ordinary meaning we give to two phrases: "the land of the free" and "the land of opportunity." We use those phrases virtually synonymously. In our way of thinking, freedom and opportunity are not different from each other but part of the same thing. Freedom implies the availability of opportunity. The opposite also holds: if one does not have opportunity, it implies that he or she is not free.

That idea resonates in our popular culture. It has done so throughout history in the American Dream's promise of economic opportunity. The message of the Dream says that there is—and it is right that there should be—enough opportunity in this land for people who work hard, are responsible, and persevere to attain a dignified level of living and to improve their living by improving their work.[1] The American Dream's promise, in point of fact, captures an essential aspect of genuine freedom, necessary to place liberty on a sound moral foundation within Lockean reasoning as well as the thinking of many of the Founders. To be surely moral, leaving "enough and as good" must mean for all Americans, as it has meant for Frank Vitale, that sufficient economic opportunity remains for every individual who works hard and perseveres to rise to a decent living through work and advance through improved work.

This morality reflects more than a popular way of thinking in our culture. The nation's vast complex of social policies enacted during the past century follows along the lines of that very same morality. A direct result has been the development of a public sphere over the years whose size and scope extend well beyond anything that adherents of the free-market perspective on liberty can defend, much of it without direct mention in the Constitution.

At the start of what conservatives called their freedom revolution in 1995, Robert Livingston, whose great ancestor had administered the oath of office to George Washington, became chair of the House Appropriations Committee. As if on a holy crusade, he immediately announced he would wage all-out war to slash the federal budget in the name of individual freedom, punctuating his resolve by wielding a machete in one hand and an alligator knife in the other.

Many Americans sympathized, as they have through the ages. It is an old issue. Will Rogers remarked many years ago, mocking government for the harm it can cause: "Be thankful," he said, "that you're *not* getting all the government you're paying for." Pitched battles over the proper size and power of government go all the way back to the birth of the Republic.

And it's understandable, if only considering the sheer magnitude of the budget today. It seems inconceivable that the $1.8 trillion our society devotes annually to social policies these days, or anything close to it, could be needed for purposes having to do with an obligation of individual freedom to assure economic opportunity. The amount staggers the mind, surely in relation to any idea we might have about small government, so much so that the spending is an object of derision among many Americans. One familiar phrase describes it as "that great sucking sound you hear," said with not only displeasure but also almost a feeling of powerlessness. Not very well understood, articulated, or appreciated, especially over recent years, are the obligations we have to one another as Americans in order for freedom to be genuine, defensible within its own process of reasoning, and what those obligations call upon us to do.

Four Guidelines for Social Policy

I have interviewed many Americans whose fortunes ran a very different course than that of Frank Vitale. Though they worked, they remained unable to provide standard necessities for themselves. They were and continue to feel they are poor. They are lab technicians, assembly workers, laborers, dishwashers, janitors, bookkeepers, hospital orderlies, office clerks, even office managers. I remain shaken by how trapped many of them feel—how little freedom they see in their own lives. Despite years of hard work, they tell me, "I feel like I'm pinned to the ground," or "God does not love me any more," or "What have I done to deserve this?," or "I'm less than nothing." How should we respond to such people? What does the nation owe these individuals, if indeed anything?

One perspective on liberty, as I have recounted in Chapter 2, is that individuals are free to make their way through the voluntary exchanges that take place in the free market. Beyond this, we all remain free as individuals to be compassionate and to assist poor Americans through charity or philanthropy. In order to remain morally compatible with this view of liberty, though, the assistance must be voluntary. Assisting as a collective society through an expansive social policy, requiring the backing of coerced taxation, would abridge the liberty of

those taxed unless, perhaps, such assistance is needed to sustain life or to provide a very basic level of education and job training for the poor. I have shown how this free-market perspective on liberty, although it traces back to Locke, encounters serious moral problems within Locke's and the Founders' own processes of reasoning about liberty.

I have set forth an alternative view that addresses those problems. Able individuals remain free in a civil society that protects private property only on the condition that they retain access to opportunities that provide a dignified level of living by way of their labor,[2] through a choice of employments sufficient to address issues of dependency, and that enable them to improve their living by improving their labor. Under liberty, we owe all individuals access to such opportunities, through collective societal action if need be. Access to this level of opportunity represents genuine freedom, I have said, because any lesser level of opportunity begins to raise serious questions within the method of moral reasoning used by Locke as well as the concepts held by many of the Founders—indeed, the reasoning process that most leading advocates of free-market liberty themselves ultimately look to and depend upon.

Arising from genuine freedom are a number of guidelines that social policy must obey, four of them in particular. The four guidelines, in turn, render the extensive reach of today's social policies, including much of the $1.8 trillion in annual tax money spent on them, comprehensible. The guidelines function like a public philosophy; they enable us to understand why the policies, far from undermining or reducing individual freedom, are imperative within a historically American way of thinking about the meaning of freedom and the obligations we have to one another under freedom.

One guideline of importance is obvious. Starting at the beginning in the original condition, each individual provided a living through his or her own freely determined labor and was not morally free to take the product of another's labor except through mutually agreeable exchange. That no individual is to take from another finds justification not only in the religious principles Locke and some of the Founders used. It follows also from the timeless principle that we are each to treat one another as an end in our own right and never solely as a means, since for an individual to take forcibly from another is to treat that other solely as a means. In the same manner, with the exception of individuals who are involuntarily unable,[3] the foundation of social policy properly aligned with liberty must lie in each individual's freely determined work or employment as the means of livelihood, not simple entitlements to others' income or resources.

Second, ordinary amounts of labor in the original condition provided a level of living reasonably common to that of most others, and improved work could expect to result in an improved living. In a scheme of individual liberty, a purpose of social policy in the modern economy is to replicate those conditions if they do not otherwise exist. Assistance from social policy must have the aim and effect of assuring that individuals enjoy the opportunity, through ordinary amounts of their own labor, to be able to attain a standard of living through work that is minimally socially decent when compared with the level of living common to the society, to receive the fruits of their labor, and to be able to attain an improved living by improving their work.

Third, as the second guideline implies, social policy becomes relevant and should insert itself into the operations of the free market and general economy only when it must. It should intervene only if the free market and general economy do not themselves offer sufficient opportunities for workers to be able to provide a minimally socially decent living through their own labor or to improve their living by improving their labor.

Fourth, if government must intervene, the actions that social policy calls for and implements should involve the lowest level of intrusion that can do the job: the actions of government must be necessary, and there can be no less coercive or costly way known able to attain the same ends.

The First Three Guidelines and American Social Policy

American social policies today have grown exponentially beyond the minimal intervention that the free-market idea of liberty can support,[4] yet those same policies substantially follow the guidelines of genuine freedom. This I attempt to demonstrate in the present chapter and the next by placing the policies and the $1.8 trillion expended on them annually against the guidelines. The four guidelines are able to make sense of these policies. At the same time, they identify where serious—indeed unacceptable—flaws in the policies currently lie if freedom is the nation's aim. I focus for the moment on the nearly $1.3 trillion in expenditures on social policies that lie outside health care, and I return to the issue of health care at the end of this chapter and again in Chapter 6.

The First Guideline

Consider the first guideline. It requires that social policy build upon the able-bodied individual's labor rather than serve as an entitlement to a living regard-

less of work. Expenditures on social policy fall into a number of different categories. Yet the benefits coming from almost all the policies are closely connected to gainful work, as the first guideline requires. This was the case even before 1996, that is, prior to the sweeping reform of the welfare system Congress enacted during that year.

One key area of social policy involves public education and job training, sound basic levels of which individuals require today in order to be able to access opportunities available in the modern economy, let alone for a number of other reasons related to freedom.[5] Quite a few employment opportunities today actually call for postsecondary education. As table 3.1 shows, governments at all levels spend about $495 billion annually on education and job training.[6] With respect to the first guideline, obviously, neither public education nor job training delivers any benefits to any individual's material well-being outside of the connection they bear to that individual's future gainful work.

Much the same is true for a second class of social policies. This category includes the minimum wage, fair-labor and anti-discriminatory regulations, the Earned Income Tax Credit, and in-kind benefits (such as food stamps and housing assistance) that go to low-wage workers ($66 billion in annual expenditures). All those policies subsidize or otherwise attempt to lift basic wages for jobholders with the result that a necessary condition for the material benefits related to the policies, once again, lies in work.

A third category of programs—Social Security, public-employee retirement benefits, disability, unemployment, and worker compensation assistance ($619 billion in expenditures per year)—all provide economic security benefits that are linked to one's present and prior history of gainful employment.

Finally, the fourth category is welfare assistance ($109 billion in annual expenditures), which includes not only direct income assistance, known as welfare, but also in-kind benefits directed to families on welfare as well as Supplemental Security Income (SSI) for the blind, disabled, and aged and foster care for children. Until its reform in 1996, welfare policy entitled able-bodied parents, indefinitely, to income assistance that bore no relationship to work. It was unusual in this regard within American social policy, as the other three categories of policy attest.[7] The "welfare queen" driving her Cadillac to the government office became a kind of American legend, emblematic of lazy cheats living off everyone else.

Notwithstanding that, even at its zenith in the mid-1990s, spending on

Table 3.1. The Link between the Economic Benefit of American Social Policies and Work, 2000

Class	Programs	Link of Benefits with Work	Cost[a]
1	Public education; Head Start; job training	Future work	$495
2	Minimum wage; Earned Income Tax Credit; in-kind benefits to workers; job discrimination and labor law regulations	Present work	66
3	Social Security; unemployment assistance; worker compensation; public-employee retirement; disability	Past work	619
4	Welfare assistance, including in-kind benefits; SSI; foster care		109
	Pre-1996 (welfare)	None	
	Post-1996 (welfare)	Five-year entitlement limit	

Note: Excludes health care (Medicare, Medicaid, public hospitals and clinics), with a cost of $542 billion annually. Sources for figures are cited in note 6.

[a]For 2000, in billions of 2000 dollars.

welfare assistance was proportionately very small. Added together with SSI, it amounted to less than one of every ten cents of spending on all social programs outside health care and to about 3 percent of total public expenditures in the United States.[8] Moreover, as demonstrated in this and the next chapter, even this relatively small level of spending took place in the context of a scarcity of opportunity in the general economy for many welfare recipients—and many millions of other Americans as well—limiting the ability they had to provide a minimally decent living through work or to improve their living by improving their work. Such an economic scarcity is important, in the moral reasoning of individual liberty, because it serves as a triggering condition for collective intervention.

The Second and Third Guidelines

The second and third guidelines speak to this triggering condition that calls for collective intervention under individual liberty. The triggering condition has to do with the level of availability of work in the economy enabling individuals to provide a minimally socially decent living through their labor and to improve their living by improving their work.[9] It speaks to the central issue, that is, of whether "enough and as good" does or does not continue to exist for all. With respect to this triggering condition, as I suggested a moment ago in speaking about welfare assistance, the bottom-line reality is that economic op-

portunity is now and has for many years been far from sufficient. There has not been nearly enough. And, what is worse, our official measures have badly deceived us.

The Measurement of a Socially Decent Minimum.

For about four decades, American social policy has rested on a measure of a minimal living known as the official poverty line. Both the concept and the methodology that launched this measure conformed completely to the idea of genuine freedom. At the start the official measure attempted to determine the smallest income households needed to provide a living for themselves that would be considered minimally socially decent or dignified by standards current to the day, just as genuine freedom calls for.

True to this way of thinking, the reference point at the beginning for measuring the official poverty line was the budget of the average American family, not the budgets of poor or destitute Americans. This is because the measure aimed to determine the least amount of income families required to live healthfully and safely "consistent with the standards of living prevailing in this country." That is to say, "to be poor is to be deprived of those goods and services and pleasures which others around us take for granted."[10] Both of those last two quotes are the words of Mollie Orshansky, the individual who formulated the measure that became the official poverty line. She was expressly thinking in terms of the idea of relative economic equality. As a government report put it, "the poverty measure used by the Census Bureau . . . is an attempt to specify in dollar terms a minimum level of income adequacy for families of different types, in keeping with American consumption patterns."[11]

Over time, though, the application of the poverty line has veered far away from its intended link to the current consumption patterns and minimum prevailing standard of living of Americans. With the aim of keeping it up to date, the poverty line was revised every year to reflect increased prices. That seemed to make sense. But the adjustment took account only of inflation—the rise in prices over time to buy the same basket of goods. As a result, the official poverty line today is essentially what it takes in today's dollars, adjusted for inflation, to purchase the same poverty-line level of living that was appropriate to a half century ago, in 1955, for that year furnished the basic data for the formula for the very first poverty measure. Updated thereafter only for inflation, the poverty line lost all connection over time with current consumption patterns of the average family. Quite a few families then didn't have their

own private telephone, or a car, or even a mixer in their kitchen. Using consumption patterns of the average family from a half century ago rather than today to reference the poverty line is like trying to find out today's headlines by buying a newspaper printed in 1955. Speaking to conditions of living in 1965, President George W. Bush inadvertently made the case as to why today's poverty line needs revision: "When it comes to cars, and when it comes to health care, 1965 is not the state of the art," the President observed in 2003.[12]

Suppose Orshansky, at the turn of this present century, had devised the selfsame poverty measure for the year 2000 exactly as she originally did, based on the correct data for that year rather than for 1955. Had she done so, using the identical measure as the original, the poverty threshold for 2000 would be approximately 170 percent of today's official poverty line.[13]

The official poverty line has thus been allowed to fall substantially below a socially decent minimum over the years, even though its clear intention (what I will call the "intended poverty line") was to measure such a minimum. As surveys of Americans attest, the public itself fully understands that for any family just to be able to get along takes an income significantly above the official poverty line.[14] With regard to everyday experience, the smallest amount that poor families find they actually must spend in order to make ends meet in everyday life says exactly the same.[15]

The Adequacy of Opportunity in the General Economy.

What does the mismeasurement of poverty imply for the wages it takes to support a minimum socially decent living, the living that the poverty line intended to measure? How well is the economy of the nation doing in providing sufficient opportunity relative to that level of living, that is, the kind of opportunity conforming to the moral reasoning of individual liberty?

Suppose we start with the intended poverty line in construing the necessary income. Presume a family of four, two adults and two children, with one adult employed full-time, the other two-thirds time. Say that their combined earnings need to bring them to 170 percent of the official poverty line. In 2001, that income would be $30,300, about $2,500 per month. Such an income stands at almost exactly half of the median income for an American family of four.

What does a family budget built on this income actually look like? How well can a family of four do if it spends its money very carefully? It doesn't buy a whole lot. A family can make it, but it can do so only with the basics and then only frugally.

Think about it. On this budget, a family of four would have $450 per month to allot for food (equal to the lowest-cost food budget necessary to attain nutritional adequacy according to the Department of Agriculture); $420 per month for rent (the amount the Department of Housing and Urban Development has calculated is needed to rent its defined low-cost two-bedroom apartment) and another $110 per month for telephone, power, water, and other utilities; about $360 per month for transportation (the amount needed for gas, insurance, repairs, license, and financing for a single medium-sized car owned for ten years plus one annual bus pass on public transportation); about $120 per month for clothing for the four family members combined; $220 per month for all medical bills and health insurance (the out-of-pocket medical expenses of an average family); $200 per month for child care (the amount needed over a year to pay for day care for two children solely during the summer months); and about $275 per month for personal federal, state, and local income taxes and Social Security taxes. This leaves about $350 per month for everything else. Everything else includes all personal health and cleansing items (toothpaste, toothbrushes, shampoo, soap, paper products, laundry detergent, kitchen cleanser, razors, feminine hygiene products); rental insurance for their apartment; replacing dishware, glassware, towels, and bedding; postage stamps; a few presents; school supplies and extracurricular activities for the children; a newspaper; and repairs on household appliances.

It's a pretty basic budget. There's little to spare. Notice that there's no money for vacations, travel, emergencies, or any savings, not even for a meal out, since the low-cost food budget doesn't cover it. Although families living on this income might opt to do these things, they would then have less money to spend on the already frugal food budget, or they would have to forgo car insurance, delay needed car repairs, or put off medical care. This is why the public believes that something close to this income is the smallest amount a family of four requires to be able to get along in the average American community.[16]

For the moment, let's say that this income, or something close to it, is the income needed. *It is certainly what the official poverty measure itself intended when it was constructed* and also what Americans think it should be; in addition, it is what the actual experience of low-income households shows is necessary to get along.[17] To attain this income through earnings would require a wage of about $9.00 per hour for one and two-thirds full-time workers.[18] That is not a high wage. It falls well below the average wage. A wage of $9.00 per hour, actually, came to barely half of the average wage for all workers in 2001, just 52 percent,[19]

and to just 63 percent of the average wage for all production workers in the nation.[20] The minimum wage in 2001 stood at $5.15 per hour. Elsewhere I have shown that a wage of $7.60 per hour or more, year-round full-time, was required in 1994 nearly everywhere in the nation and $6.10 per hour or more in 1989[21] (the minimum wage in those years was $4.25 and $3.35 per hour, respectively). I also showed that a deficit of nearly 16 million year-round full-time jobs paying this wage or better existed in 1989 relative to the number of households needing at least one such job and second earners occupying those jobs.[22] That deficit of nearly 16 million jobs then amounted to 23 percent of the 67 million households dependent upon the economy for a living.[23] Many of the individual Americans left out of adequate work were both well educated and persevering, as I show in the next section of this chapter. The shortage of opportunity was that large. At the time, in 1989, the economy was at the top of a seven-year recovery.

A very different kind of measure documents much the same shortage of opportunity. Consider what it means to be a distressed worker. That is a worker who is unemployed and searching for work, or a worker holding a part-time job who is seeking but unable to find full-time employment, or a worker who occupies a year-round full-time job with pay below a minimally adequate wage (approximately $6.10 per hour in 1989, $9.00 per hour in 2001). In 1989, the proportion of such workers stood at about 19.6 percent of all workers, nearly one in every five, though the economy was then at the peak of a long expansion.[24] So many workers suffered this experience precisely because the jobs needed to support a minimally decent living weren't there.[25]

A decade later, in 1999, the economy was in its eighth continuous year of growth. Yet during that year the proportion of distressed workers still hovered at nearly 17 percent, totaling 23 million workers.[26] Every one of those 23 million workers in 1999 was unemployed, or in a part-time job and unable to find full-time employment, or working full-time and getting pay below an adequate wage, this despite eight successive years of solid expansion in the economy.

The point is that even when it is operating at its strongest and most powerful, as in both 1989 and 1999, the economy left a great many Americans with wages falling short of the level of opportunity that individual liberty calls for in the second and third guidelines. If the wage I have identified is reasonably close to the lowest required to attain a socially decent living, economic opportunity that comports with a morally tenable idea of freedom appears to have eluded the lives of a large number of workers and their families.

A massive doubling in the growth rate of the supply of labor very likely

influenced the free-market wages for many of those workers. That doubling of growth in the labor supply continued year after year for nearly three decades, extending from 1965 into the 1990s. The avalanche of workers came from the huge baby boom that began to reach adulthood in the mid-1960s, mounting numbers of women entering the labor market, and rising legal immigration.[27] In a free market, a greatly increased supply of any commodity is expected to result in lower prices for it. In the case of labor, that means lower wages. Meanwhile, amid the mushrooming oversupply of workers, the power of organized labor went into a tailspin. Union membership as a proportion of all workers dropped by half over the period. For the wages of workers at the bottom, the mounting oversupply of labor coupled with the declining bargaining power of workers proved a lethal combination, shutting many millions of workers out from work that paid a minimally adequate wage.

On top of the circumstances confronting low-wage workers was another stunning development. It has to do with the ability of the typical American worker to improve his or her standard of living by improving his or her work. From 1973 to 2001, the productivity of the average American worker climbed by more than 50 percent per hour of work and by nearly 40 percent from 1973 to 1995 alone. To what degree did that improvement lead to increased real pay? By 1995, most workers had received no increase at all in their real hourly wages, or even in real hourly compensation, which also includes benefits. In fact, the median American worker (the worker exactly at the midpoint) was actually paid a lower real wage in 1995 than twenty-two years earlier, this despite the near 40 percent improvement that took place in workers' average productivity.[28] Since the median worker represents half of all workers, the ability to improve one's living by improving one's work, and to reap the fruits of one's labor, had evaporated for many American workers.

After 1995, real wages and compensation started to rise but still not enough to begin to bridge the dramatic gap that had opened up over the prior generation between the productivity advances of workers and their pay. By 2001, the gap that had grown between the median wage and improved productivity was worth a pretty penny, lowering compensation by about $6,400 per year for the median American worker employed full-time.[29] That comes to about $3.20 per hour for a worker employed full-time. For a husband and wife working the hours of a typical family containing children, the gap separating pay and productivity came to $11,000 in income per year. By 2003, the figure exceeded $13,000 annually in lessened pay.[30] This widening gap between productivity

and pay marked a new development in the American economy. From 1945 to the early 1970s, wages for the typical worker and family had risen pretty much in tandem with the general rise in productivity.

What gave birth to this development? The widening gap that began to open up between productivity and pay following the early 1970s did not result from insufficient average compensation, as we might immediately suspect, arising from the alleged suppressive effects of global trade competition on worker compensation. Instead, the cause is the sharply increasing inequality of wages and salaries that has become the economy's defining feature over the past three decades. For, when one looks at average compensation and not the middle worker, the gap between compensation growth and productivity growth entirely disappears.[31] Average compensation takes account of the huge pay increases received by those at the top, whereas median compensation, which measures the situation for the individual exactly in the middle, does not. Overall compensation was satisfactory; it just never filtered down.

Some say that the growth in inequality itself arose from differences in productivity among workers, not, as I have suggested, from a massive oversupply of labor coupled with organized labor's declining ability to protect ordinary workers. In an increasingly technological economy, according to this view, workers with greater education and skills have the ability to command premium prices for their work.[32] Workers at the top, who are the most highly educated and skilled, are able to take advantage of the new technologies and become more productive, from which they reap the rewards. By contrast, the average worker does not have the same educational advantage. So pay raises were skewed substantially toward the top. This "return-to-skill" answer, though, leaves a lot unexplained. For example, the most "highly educated" in the economy often refers to workers who have earned college degrees, who constitute about one-third of the labor force. Yet the lopsided pay increases went almost exclusively only to those at the *very* top of the earnings and income ladder—the top 5 percent or so, only one-sixth the number even of those workers who had college degrees.[33] Moreover, the explanation fails to account for why workers in many major European economies did not experience the same degree of wage inequality as American workers over the past thirty years despite the fact that they were subject to the same technological environment. Nor does it tell us why the growth of productivity itself during the past three decades has proven unable to match typical historical rates of growth if it is true that technology has been such a driving factor. Had technology been an unusually strong force behind the

growth of the economy, productivity should have advanced more quickly than normal, not more slowly.

The morality of individual liberty summons us to evaluate social policies keeping in mind the scarcity of economic opportunity to earn a minimally decent living through work as well as to improve one's living by improving one's work. As a triggering condition, the sheer magnitude of the scarcity of opportunity in the general economy has powerful implications concerning the need for social policies that are in the first class of programs in table 3.1 (education and job training), the second class of programs (assistance to low-paid employed workers), the fourth class (welfare assistance), and programs such as unemployment assistance that are in the third class. I return to those implications and commonly raised issues about the policies themselves in the next chapter when I examine the fourth guideline.

It is pertinent here, though, to raise a point relevant to the largest program not yet mentioned, Social Security. The overall scarcity of decent economic opportunity applies with special force to individuals of advancing age, who do not have the same employment opportunities as do middle-aged or younger workers.

Consider workers who are between the ages of fifty-five and sixty-four. Almost one-half of the jobs held by those individuals are either downsized or displaced in the economy during a ten-year period.[34] This rate of job dislocation is about *50 to 60 percent* greater than the rate that workers aged twenty to fifty-four experience.[35]

Moreover, when downsized or displaced, workers in their late fifties and early sixties often encounter substantial difficulties in regaining a foothold in the economy, even in good economic times. The economy reabsorbs older workers poorly, even when they are capable and healthy people. Business consultant Bill Repp points out: "As one manager put it, 'It doesn't work to start a senior guy at entry level because he knows too much, and sets a standard others can't match. But if we start him at a high level, others resent him for not having come up through the ranks. It's easier to just avoid the problem by not making the hire.' "[36] Durant Hunter, president of a recruitment firm based in New York City, observed: "As an executive recruiter, I have rarely had someone say, 'Can you find me someone over 50 for this job?' It's almost always, 'Find me someone 35 to 45.' "[37] For prospective employees of fifty-five or sixty, issues concerning the age of a new employee diminish the chances that downsized or displaced workers have for many of the midlevel or top supervisory job openings.

At the same time, issues of "overqualification" erode the chances many of those same prospective employees have for lower job placements, certainly at pay levels recognizing their actual capabilities.

Because of considerations such as these, the probability is high that a large number of individuals as they advance in age, even when they are fully competent and able, will eventually find themselves at a serious disadvantage in attaining and preserving employment allowing them to gain a decent living and improvement, surely commensurate with their competency. And this observation describes *good* times; were there to be a general recession and spreading unemployment, many displaced individuals of advancing age likely would be left on the sidelines, indefinitely and even permanently, without opportunities for adequate employment. Social Security addresses these economic realities facing older Americans and attempts to do so in the least coercive and intrusive manner practicable, as I try to show when I take up the fourth guideline in the next chapter. The program has an ancillary consequence that bears mentioning, too. By enabling workers to retire, it has reduced the size of the labor force in an economy whose surpluses of labor from other sources, mounting over many years, already had a debilitating effect on the wages of most other workers.

Key Counterarguments and Evidence.

Before turning to the vital fourth guideline and examining how well our public policies measure up against it, we need to take up several powerful counterarguments. They help test whether the points we have made in relation to the first three guidelines stand on firm ground, particularly concerning the triggering condition. Is it really true that decent economic opportunity fitting the moral reasoning of liberty is as deficient as I have said? There seems so much evidence to the contrary.

The upward economic mobility of Americans. For a start, just recall the example of Frank Vitale. Growing up dirt poor, he began with nothing, not even a high school education, and made it. That he and numerous others just like him started with so very little and attained the good life through work would seem proof by itself that plenty of opportunity exists. Stories of such people are familiar to us. Some economic statistics suggest that these stories are not just the odd example, either, but quite typical. Those statistics tell us that only a tiny percentage of individuals age sixteen and older who begin in the lowest fifth of the nation's income scale remain there ten or fifteen years later.[38] Such evidence, combined with compelling stories like Frank's, support and sustain the

widely held perception that economic mobility is common in this nation, that a large majority of individuals who start out at the bottom and who work and persevere do move up the ladder. If so, it would seem obvious that there's no substantial shortage of opportunity necessitating collective societal intervention, certainly not on its present scale.

In the case of statistical studies, individuals' income may rise (or fall) dramatically for many reasons, of course. Dramatic changes in income obviously occur when workers take their first "real" job out of school, or when they leave jobs through, say, unemployment or retirement, or when they get married or divorced. If, for example, a good proportion of individuals age sixteen and older who occupy the bottom rung at any point in time are still of school or college age and irregularly employed, if employed at all, it stands to reason that the income of many such individuals will rise with the passage of time simply as the natural result of their entering adulthood, finishing school, and becoming continuing full-time workers.[39]

The real question concerning economic opportunity and upward mobility is what happens to workers once they enter into regular employment, particularly those who start at or near the bottom. If they occupy low-wage jobs, as Frank Vitale did, and they work and persevere, do they rise to decent-paying jobs? By this, I mean a job with a wage able to lift them to or above the intended poverty line. Consider the entire ten-year economic cycle from 1979 to 1989, covering the robust Reagan era, exactly the time when Frank began his own upward advance. The nation's real GNP climbed by nearly 30 percent in those years. The stock market *doubled* in real terms. Yet the real wage of all workers barely inched forward, rising by about 5 percent. For the bottom two-fifths of earners, wages were actually lower in 1989 than in 1979.[40]

Now consider all workers who were in jobs and employed full-time for ten successive years. How well did they fare if they started off in a low-wage job? How many of them progressed to jobs paying an adequate wage? Some of them indeed did advance. If we think about workers with children, approximately four in every ten advanced. This is to say that six in every ten remained in a low-wage job, including those with a high school degree, even though they had worked steadily and full-time for an entire decade during so-called booming times.[41] Workers who had gotten from one to three years of education beyond a high school degree fared no better. Despite having completed some education beyond high school, only about four in ten of them, too, rose from a low-wage to a decent-paying job during the ten years.[42] The remainder—six out of ten of

those workers—held a low-paying full-time job at the end of the period just as they did at the start. Fully one-third of all low-wage workers had some college education. When a great shortage of decent-paying openings exists, even a fair number of workers with perseverance and education are likely to face difficulty moving ahead. The same phenomenon continued into the 1990s.[43]

Upward mobility even for less than half of those workers who begin low on the ladder still means that quite a few workers will rise from the bottom, offering numerous examples of the American Dream at work. Upward mobility for four in ten full-time low-wage workers through a decade yields millions of success stories.

However, liberty does not advertise itself as a *statistical* or contingent matter applicable to a certain percentage of all individuals, such as 40 percent or 50 percent. It, along with the level of opportunity it promises, is supposed to exist for *every* individual, or as nearly so as possible. That a significant proportion of individuals are unable to attain an adequate wage despite having above-average education and persevering over many years of full-time employment testifies to a substantial shortage of decent opportunity. That scarcity of opportunity undercuts the individual liberty of the workers ultimately shut out, who, in effect, are free to attain a minimally decent living through work only on condition that others do not attempt to exercise their freedom.[44] For all the uplifting success stories, and they are rightly inspiring, there are as many or more stories of individual Americans who are steady full-time workers, who persevere over long periods of time, and yet despite everything fail to get ahead.[45]

The improved standard of living of American families from the 1970s to the 1990s. Is that really the case, though? Do these Americans really fail to get ahead? I have said that wages for American workers remained generally stagnant over the period since 1970, despite the improvement that occurred in their productivity. However, if that is true, why did the standard of living rise for so many of our families, including both average and low-income families? The proportion of American families owning two or more cars nearly doubled over the period from the 1970s to the 1990s, as did the proportion with air conditioners in their home. And the proportion of the nation's households living in crowded conditions (more than one person per room) dropped by about two-thirds.[46] That the material well-being of average Americans improved while real wages faltered calls the measures of real wages into question. Those questions multiply when we consider that families on the bottom rungs of the income ladder—whose real wages actually *dropped*—also experienced advances in their material well-being

over the period. Thus, the proportion of poor households living in crowded housing conditions fell by half from the 1970s to the 1990s. The proportion lacking some indoor plumbing declined by more than half. And those having telephones in their homes rose by 30 percent.[47]

Based upon the evidence, it seems, workers did not need to gain wage hikes in order to become better off. They apparently could become better off on the same (or even lower) real wages. Something's not adding up here.

One possibility is that although the economic well-being of Americans gained in some respects, it lessened in other respects. For example, the proportion of families owning their own home actually fell slightly from the 1970s through the mid-1990s. So did expenditures on food relative to what is minimally necessary for family nutritional health.[48] Even so, from the top to bottom of the income ladder, the overall material well-being of American households clearly improved—even taking into account the particular areas of constancy or possible decline—despite the seeming wage stagnation characterizing the period.

A solution to this puzzle is that what families are able to purchase is not a function of their rate of pay alone. Family income and level of purchasing also depend upon the total number of hours its members work, how large the family is, and the level of debt the family takes on. Wages can rise yet income fall if workers decide to work fewer hours, for example. The same is true in the other direction. Income can rise despite a drop in wages if workers are employed longer hours. The latter is what happened in the case of the average American household.

The real income of the average family did grow from the 1970s to the mid-1990s, for instance, by a little more than 10 percent. That growth occurred not because workers' wages rose. Failing to increase, wages reflected none of workers' rising productivity. Rather, income rose because families stayed on the job ever longer hours. It was a phenomenon that many American families experienced. In married-couple families with children, increasingly both husband and wife—father and mother—took jobs, leaving them less time for their children and family life. So, increasingly, did single parents with children. During 1979–1995, the number of hours median-income married couples with children worked over a year climbed from 3,272 to 3,816. That's a 17 percent increase in hours of work. In turn, the real income of the median such family grew by 12 percent.[49] Average families also became smaller over the period. That allowed them to improve their real income and material well-being, per person, by still more—from 1979 to 1999 by about $8,000 yearly, after taxes, for a four-

person family, approximately 20 percent.[50] American families thus worked considerably longer hours and also reduced their size. In addition, they went into increasing debt. Only in those ways could they counteract the generation-long failure of real wages to deliver a living that was reasonably in line with improvements in workers' productivity.[51]

Like the average American family, families on the lowest rung of the income ladder also increased their hours of work, by nearly 10 percent. In their case, though, the result was still worse: they ended up with lower real income even in the face of the added hours of work.[52] Their real hourly wages had fallen by that much. How, then, did these families improve their economic well-being *if their wages and their income both dropped?*

While average families spend a noticeable fraction beyond their income, the Bureau of Labor Consumer Expenditure Survey finds that the expenditures of families on the bottom rung far exceed their reported income—by an order of magnitude—owing to numerous factors. Those factors include the receipt of charity; borrowing from family, friends, and others; various forms of governmental assistance; and under-the-table and illegal income, among other ways of augmenting income. Through sources such as these, the total annual spending of individual households that are lowest on the income ladder more than doubles their actual income. In the end, families at the lowest end of the income scale in 1999 spent just above 170 percent of the official poverty line on average, though their actual income came to less than half that, barely three-quarters of the poverty line. The spending of those families represents a 12 percent real increase over what their lowest-income counterparts spent in 1973, which once again substantially surpassed the actual income they had then.[53]

The reality that low-income households end up having to spend considerably more than their reported income in order just to make ends meet contains important lessons. For one, it provides confirmation of what I have called the intended poverty line. It suggests that the economy budget at about 170 percent of the official poverty line in recent years (outlined earlier in this chapter)—and the intended poverty line itself—describe fairly accurately the smallest amount households actually need to spend in order to get along. The same holds true if we apply the intended poverty line to 1973, too, twenty-five years earlier.[54] In addition, it suggests that the low hourly wages those households receive are not nearly enough to attain the income necessary for them to make their way, through work, which liberty morally calls for. Instead, those households end up having to supplement their low wages by turning to food banks,

charity, and public assistance and, perhaps ultimately, illegal sources of income in order to make ends meet.

There is no better nation on earth. The preceding arguments ignore the widespread view that, even if a deficiency of economic opportunity does exist, our nation affords individuals more and better opportunity than does any other nation on earth. The truth of this belief, of course, would little serve the many millions of individuals who remain closed out and unable to find decent-paying work or to raise their level of living by improving their work. Nor does doing better than other nations relieve us from the obligation to assure provision of the level of economic opportunity for all that is appropriate to the moral reasoning of liberty.

Worse, it is likely that the nation actually underperforms quite a few others when it comes to the kind of economic opportunity that is appropriate for individual liberty. Rates of poverty tend to be much higher in the United States and levels of income mobility lower than in a number of other advanced industrialized nations.[55] More instructive still are comparisons of actual wages, which tell us about the returns individuals receive from work. The United States falls well behind many other industrialized countries both in the hourly wages received by workers at the lower rungs of the pay scale and the degree to which wages for workers rise along with their improved productivity. The average hourly wages for workers in the bottom wage bracket in the United States, a category comprising more than 10 million workers, have been as much as 40 percent below the average for those workers who occupy the same bottom bracket in Europe.[56] And for 1979 to 2000, real hourly compensation for the average worker in the United States rose less than one-fifth as much as did improvement in worker productivity. In Great Britain, by contrast, compensation advances fully matched productivity gains over the same years. Compensation advances went halfway toward matching productivity increases in nations like Germany and Canada. Virtually every other nation did better than the United States in translating productivity improvements into increased pay.[57]

Our nation has been the world's champion in creating jobs, leading to lower levels of unemployment. But generating sheer numbers of jobs is not the same thing as fashioning the kind of economic opportunity through work that the morality of individual liberty entails. With regard to the latter, the nation has performed more poorly than many others in several key areas. It is not simply that there is more poverty here than elsewhere, but the proportion of jobs paying below a minimally adequate wage is substantially higher here than in

most other advanced economies. And the link between pay and productivity has suffered far more greatly here than in most places elsewhere. All these developments in turn have caused economic mobility here to slow relative to trends in most other advanced countries.

Conclusion

Once, perhaps during the nation's first century or more, it may have been appropriate to consider the vast frontier and open lands to the west sufficient to meet the obligation of freedom that a decent level of economic opportunity be available to all. The Homestead Act of 1862 certainly aimed at affording such opportunity for all. That kind of opportunity, though, no longer exists, if indeed it ever truly did. We now rely upon employment within an exchange economy. With respect to employment, individual liberty calls for greater opportunity than the level our economy has been delivering, substantially greater. The scarcities of opportunity are serious, on many different fronts. It is this truth that justifies intervention by government to redress the scarcities in the name of making individual freedom genuine, that is, in the name of making freedom moral within its own frame of reasoning, reflecting the thinking of the Founders. As Lincoln was later to observe, only freedom containing this level of opportunity could deliver hope to individuals worthy of the name freedom.[58]

Yet proper reasons for intervention and the manner that that intervention takes are very different matters. The intervention of social policies, even for defensible purposes, may substantially exceed what is needed, or it may be counterproductive. Are the interventions of government as confined and limited as they can be? Are there better alternatives that call for smaller government and a lesser collective societal effort? Those fundamental questions bring us to the imperative of freedom set forth in the fourth guideline, which deserves its own chapter. For the questions lie at the heart of many of the largest issues now before Congress and the nation.

CHAPTER FOUR

Education, Social Security, and Welfare Assistance

The moral reasoning of liberty regards affirmative intervention by government to be legitimate if required to overcome shortages of economic opportunity inimical to freedom. The level of intervention must be of sufficient strength to remedy the shortages. Yet freedom's same moral reasoning obliges government to restrain itself and use the least coercive or restrictive way known to be able to attain its objective. That is the imperative of the fourth guideline. To achieve good and proper objectives through unnecessarily coercive or restrictive means, for obvious reasons, violates freedom.

Does the nation's social policy, which now consumes nearly half of all government spending, abide by this crucial principle? To answer this question, I focus upon three areas: the two largest areas of expenditures in social policy (education and Social Security) along with an area about which, as we have seen, the first guideline already raises important questions (welfare assistance). Those three areas cover a wide range of problems. I examine how the general approaches that government takes in those areas, as they have evolved through history, measure up to the requirement of the fourth guideline that public intervention be at the lowest level of coerciveness consistent with assuring

adequate opportunity. At the same time I pose the opposite question, that is, whether intervention is at a level strong enough to be able to redress shortages and attain adequacy of opportunity as the first three guidelines require and the moral reasoning of individual liberty demands. What we will find, as a rule, is that the policies have not gone too far, beyond the precepts of freedom. To the contrary, despite their expansion over the years, quite often the policies do not yet go far enough.

Education

In order to be able to take advantage of opportunity in a modern, competitive economy and make one's way in life through work, as well as for a number of other reasons related to liberty,[1] the opportunity to gain an effective or sound basic education must be available to every person.[2] That opportunity is a right of liberty respected at least at some level in the constitutions of all fifty states. The right itself to the opportunity for an effective education carries enormous resonance within our culture. For this reason, the catch phrase "Leave no child behind" is now used by liberals and conservatives alike, Republicans as well as Democrats. The provision of public education became widespread first in the United States. Today nearly 90 percent of students in primary and secondary education attend public schools.

Both the right of all individuals to the opportunity for an effective basic education and the provision of education publicly raise a number of issues having to do with coerciveness.[3] A useful way to examine these issues is to compare the policies with some alternatives to them. A bedrock issue concerns how to secure the financing necessary to assure educational opportunity sufficient to satisfy the obligation. Protecting a right of liberty, ultimately, is an obligation of all citizens. For this reason, assuring the requisite educational opportunity as a right of liberty becomes a general collective obligation of society in a scheme of individual liberty. It is not an obligation simply of particular citizens, such as those who have children or, narrower still, those whose children actually attend the public schools.

From a practical perspective, a general collective approach is needed, in any case, to attain the end. Consider a program of public education that is more narrowly collective in its financing. Suppose, for example, that public education is supported only by those families with children in the public schools. Operating such a program would mean that middle- and upper-income families

who can afford private education, and who decide to send their children to private schools, would not be obliged to help finance public education. The diminished public funding available for students from lower- and moderate-income families then would likely be insufficient to furnish the necessary effective education for them. In that case, meeting the obligation of freedom to provide effective education for all could not occur without help from those taxpayers who have no children in the public schools, and so it would require their support, as is the situation now.

This is not to mention that individuals with children attending private schools as well as childless individuals often themselves benefit financially from public education, sometimes significantly so. Many such individuals received a public education when they were children. In addition, their property values are affected by the excellence of public education in their area. What is more, they share in the improvement of the general society and economy that a broadly, as opposed to narrowly, educated citizenry and workforce bring. Some of the ways in which they may benefit, such as through property values, are also central to the ways that most states and localities finance public education. For all these reasons, but foremost the principle that educational opportunity as a right of freedom is an obligation of society, it is appropriate under liberty for the general citizenry to provide the financing for public education, no matter whether individual citizens have ever had children or whether their children attend public schools. Taxpayers, of course, are asked to support those children who attend public schools, not those in private schools, unless supporting children in private schools lowers taxpayer cost while still providing all children the option of an effective educational opportunity through the school system.

Nearing $500 billion annually, the expense of public education is substantial. Could the provision of public education be accomplished more cheaply or efficiently, perhaps through contracting out, and so become less coercive by reducing the financial burden taxpayers are asked to pay? Perhaps, yet public education does appear to be reasonably competitive with for-profit ventures in terms of cost, as the experience of the for-profit company Edison Schools suggests. Edison Schools manages and operates dozens of public schools for which it has contracts. It thus works with exactly the same kind and mix of students now in public schools. Starting in the mid-1990s up through its seventh year of operating schools, the company had yet to turn a profit. Nor had it figured out how to spend discernibly less per student, as compared with the public school

districts' performances with the same kind of students, when its administrative, research, and capital costs were factored in.[4] The difficulties Edison Schools has experienced resulted from many complicated factors, some of them specific to the individual contracts. Moreover, the company's energetic director, Chris Whittle, assured Wall Street that profits would eventually come. He and a partner ultimately decided to withdraw from the stock exchange and purchase the company, at a tiny fraction of the stock's original price.[5] In September 2003, its eighth year after opening its first school, Edison Schools announced that it had realized a small quarterly profit for the first time. It is clear, though, that the company—spending the amount of money per student that the public schools have been willing to devote—had to work very hard over a considerable period of time to achieve that result.

At the same time, all is not well with public education, obviously. We learn from academic achievement results that many children, especially children from low-income families and areas, are likely to end up poorly educated, unable to read at the grade level of a ten-year-old. In some basic tests, those students perform below the average of students in third-world countries. By contrast, students from nonpoor areas tend to score at levels ranging from the international median to nearly the very highest.[6]

Many students who perform poorly, it is thought, are trapped in so-called underperforming schools, in effect coerced to attend those schools by having no alternative.[7] In this view, furnishing them with a choice of schools is essential in order to provide them with what liberty requires, the opportunity to gain a sound basic education. Present rules in quite a few school districts, of course, already offer some choice rather than requiring attendance at a particular neighborhood school. Rules often allow students and their families to choose their neighborhood school, or a magnet or charter school, all publicly financed, with the further choice (if they can afford it) of regulated private—or home-school—education.

But those choices are not truly effective ones for low-income families if, in reality, the only public alternatives they have amount to entry into poorly performing neighborhood, magnet, or charter schools. Since low-income families usually cannot afford a private alternative, it is understandable that public vouchers covering the cost of education, redeemable in private schools, might well seem an effective avenue to improving the education of children whenever the only options for those students are other poorly performing public alternatives.

Note that a basic premise of the voucher alternative here is that the school the students now attend is a key part of the problem so that the option to leave that school is an essential part of the solution. In keeping with the reasoning of freedom, the argument maintains that choice through vouchers to private schools will help assure that every child has the opportunity to attend an effective school. That every student must have the opportunity to attend an effective school is indeed a valid argument.

Can vouchers successfully attain this goal? A number of fundamental problems exist with vouchers as a solution. The essence of a private school is the right of the school to control which students it will accept and admit into the school. This involves the right to reject students and thus to reject some or all of these students. Try, now, to imagine a complete voucher system. Under a complete voucher system, *all* schools—public and private—would be free to admit and reject whomever they wish. In this sort of system, some students might well find *no school at all* that admits them or only a worse school than their own neighborhood public school, which now has the right to refuse them too. A basic feature of the neighborhood public school presently is that it cannot refuse entry to students residing in the catchment area, a feature that must, at least in some form, continue to exist. This is to say that without redefining the very meaning of private schools, coercing them to admit and educate certain students, the *assurance* of the opportunity for a decent education for all ultimately can come only through the public schools themselves and the improvement of those schools.[8]

In point of fact, even were private schools to accept students from low-income areas in unsurpassed numbers, vouchers would likely end up able to assist only a small fraction of the students, leaving the remainder unassisted. That has often been the experience in practice.[9] The numbers of students in low-income locales are that great.[10] Because of the selective admissions nature of private schools coupled with the sheer numbers of students involved, no guarantee can be given to most, let alone all, students in "underperforming" public schools that an effective private school will take them. No practical alternative exists for those students from underperforming schools except to fix the schools they now attend or, instead, assure them of another effective public alternative.[11]

The use of vouchers for sectarian or religious private schools raises another issue. Does such use violate the principle of liberty that the state remain neutral in matters of religion? The state can permit use of vouchers for religious schools

and also maintain its neutrality if two conditions are met. The first is that a public school alternative providing an effective education is and remains available to each student, including sufficient funding so that that public alternative continues to be a viable one for every student. Only in that manner does a true choice exist. Second, the choice of education must be the family's alone, not the state's. For students at whom vouchers are now mostly aimed, students from low-income locales, the first of those two conditions—that an effective public alternative exists and will remain viable—has not been honored.

A serious problem involving excessive coercion that is offensive to liberty does occur in public education. This problem has little to do with the taxpayers who are called upon to finance public education, the failure to provide opportunity for an effective basic education to most students, or undue constraint on the availability of educational choices for most families with students. It is appropriate that all citizens share in the financing. The education offered students in most locales appears to be reasonably effective by international standards. And except in locales with low population or rapidly rising demand, the public system often gives many families a choice of places of education for their children within the system itself. A further choice exists as well from a variety of private and homeschooling alternatives, here depending upon the ability to pay and the availability of financial aid.

The most serious problem with public education related to coercion, and loss of freedom, has to do with a completely different matter. It is the system's failure to assure *any* effective educational opportunity to some students. This is a failure that private alternatives supported through public funding, yet with no neighborhood catchment (coerced admissions) requirement, may be able to help address. But they cannot resolve the problem principally on their own. Only fixing the public schools themselves can remove the deficiency. Moreover, until this is done and effective public alternatives are surely available to these students and will remain so, offering religious private alternatives as the sole practical option to gain an effective education offends liberty.

Here we must add one other consideration. Disproportionate numbers of low-income children suffer the problems of low birth weight; malnourishment and hunger; higher levels of asthma, ear infections, and vision problems affecting classroom performance; lack of decent medical, dental, and eye care; the harrowing stress and uncertainties of unsafe neighborhoods; and a deficiency of enriching educational experiences outside school. Given the cumulative effects of those conditions on many low-income children, we must be open to the

possibility that providing these children with an effective educational opportunity requires considerably smaller class size, more skillful teachers and staff, and increased numbers of specialized professionals, together involving a higher cost per student than the norm.[12] The focus of attention in the past has been on securing equal funding for schools in low-income areas, given that property tax rates there—even very high ones—are generally insufficient. The probability exists, though, that funding exceeding the norm is required to assure such students an educational opportunity capable of lifting their average achievement levels to ones even roughly comparable to those of students from other income groups.

In many cases, too, education beyond the secondary level has become a requisite for employment and for advancement. Yet the price of tuition at public undergraduate institutions has more than doubled in real terms over the past two decades, far outstripping the average family's growth in income over those years. At the same time, loans have progressively replaced outright grants as financial aid while the loans themselves have lagged ever farther behind the cost of education. This combination has left the average student $25,000 in debt upon graduation from college[13] and begun to place postsecondary education beyond the reach even of middle-income families. The affordability of postsecondary education, too, has become a problem deserving attention.

Social Security

In one of the great euphemisms, Social Security calls our payments "contributions" rather than the taxes they really are. Social Security payments are coercive. They are taxes.

Social Security deals with the economic reality facing many individuals as they grow older, even when they are in good physical and mental health. As we saw in Chapter 3, individuals between the ages of fifty-five and sixty-four suffer economic dislocation at a high level, far more than is the case for younger workers. They are downsized or pushed out of the economy in significantly greater numbers. And the economy does not absorb older workers particularly well. Worse still, despite its strong growth for many years, the economy contains woefully inadequate opportunity even for younger workers. At some point, healthy or not, a good number of downsized or displaced individuals of advancing age will find themselves unable to locate work that comes anywhere close to matching their level of competency or, perhaps, even a minimally

decent living. That describes what occurs when the economy is expanding robustly. During periods of slower growth, or recessions and depressions, the problem of declining opportunity for older workers only worsens further.

The scarcity of opportunity for older workers is not necessarily a permanent problem. But the reality not only that it can exist in the economy but that it can last for decades, as it has, decades of vibrant economic growth, must be provided for. That's not to mention times of deep downturns.

Is there another, less coercive way to address this problem than a system incorporating all individuals that enables them to retire and leave the labor force when they reach advanced years? One obviously less coercive alternative to Social Security would be to leave the matter and the risk up to each individual, that is, to leave each individual the choice to provide for this point in his or her life through private savings or pensions. Such an alternative, though, faces the difficulty that many individuals do not have this choice. They have not enjoyed the kind of economic opportunity needed to afford them the choice. More than half of all employed persons occupy jobs that offer no private pension benefit.[14] Moreover, the wages that those jobs pay generally fall below the median wage, often well below. Relative to the amount of income it takes to attain a minimally decent standard of living, the wages of most of those jobs do not leave anything close to enough, beyond maintaining that standard, for private savings sufficient to be able to afford to support oneself in older age. Surely the wages do not leave enough after the taxes workers must pay into Social Security—which, for workers at low wages, are themselves insufficient to sustain a minimally decent living during older age without redistribution from others.

Suppose those taxes on workers and their employers were eliminated from here on, allowing workers to save that money instead. Were that to happen, there could be no guarantee that the payments that employers make to Social Security would return to employees in the form of wages, enabling them to put the money away into personal savings or a private pension plan. There is no reason to believe that, once the private employment market was freed from Social Security as an employer benefit, most of that compensation would not be transferred upward, as was generally the case for all other compensation over the past three decades.

Social Security requires each person to save approximately 12 percent of his or her annual compensation, including the employer contribution, for retirement. In turn, it delivers a retirement income with a base for most longtime

workers about at the level of the official poverty line, which itself originally represented the threshold of a minimally socially decent income. It attains that result partly through redistribution from higher earners to lower earners. Another less coercive alternative would transfer all or part of this 12 percent of required savings into individual personal accounts. The theory here is not only that the funds then will be personally owned and controlled but also that the rate of growth of those private accounts would be greater. If so, the present system not only involves required membership in Social Security but, in effect, also coerces individuals into a low rate of return.

An oft mentioned issue with this position is that transformation into private accounts would reduce the amounts now available to finance current Social Security recipients. This is a problem to be sure, but a practical one that temporary infusions of general tax revenues could cure. More fundamentally, the objective of Social Security is to assure individuals continued access to a socially decent minimum, based upon prior employment, during a time in their lives when there is likely to be increasingly inadequate opportunity for them in the general economy. A publicly funded program can assure this outcome; by contrast, no program of private accounts can.

Any program of private accounts will have both winners and losers. This situation occurs even in a positive stock market. And the stock market may well be far from benign. There is no need to refer to the 1930s or to the withering losses on the Japanese stock markets during the 1990s, a half century later. In the early 1980s, when the Japanese stock market was still going strong, the real value of the American Dow Jones Industrial Average (DJIA) in constant dollars had itself plummeted by *two-thirds* compared with its value in the mid-1960s.[15] The DJIA did not again reach the value it had attained in the mid-1960s, adjusted for inflation, until nearly three decades later, in 1991. The more recent drop of American stock markets after 1998—the NASDAQ fell by more than two-thirds—left Jim and Jan Pringle of Atlanta wondering how they could continue in retirement. Then in their sixties, they suffered a 75 percent loss of their investments. "I didn't have a lot of options when the market went south," Jim said. They left retirement and returned to the labor force. Fortunately for them, the Pringles had owned an advertising agency before retirement that billed $40 million a year.[16] Their options in reentering the labor force were considerably better than those of the typical person.

The need to have some assured minimum given the reality that markets and investments in them can fare very badly—indeed, that indeterminate numbers

of investors will lose even in markets that do well—has left the advocates of private Social Security accounts implying that the true purpose of the private accounts would be to deliver an income on top of the necessary minimum retirement benefits. Following the sharp decline of the American stock markets from 2000 to early 2003, with many of the markets lagging far below their peaks well after that, a good number of the supporters began to advertise the proposal for private accounts with an emphasis on this purpose. Such a position, though, concedes the basic point that a decent minimum can be assured to individual retirees only through public accounts of some kind.

Still another alternative would be to permit each individual the possibility of opting out of Social Security beyond receiving and making the appropriate payments necessary for themselves and others to attain the minimum benefit. This alternative is worth considering. It has appeal as long as it is understood that the payments such individuals make to the fund must be sufficient for the system to continue to be able to provide a minimally socially decent income for other workers and for themselves. Under present policy, the Social Security program already excuses all individuals from making contributions at salary levels above approximately $90,000 annually.

Why not go further, though, and give all individuals the choice of opting out of Social Security entirely for any reason, that is, the choice to decide whether to enter into the Social Security system in the first place? The Social Security system would operate with the contributions of those individuals who have decided to join. As we saw in the case of education, a problem here is that Social Security then would likely be left with inadequate resources for the redistribution necessary to finance the social minimum for workers in the lower half of the pay scale.

A more fundamental consideration exists here, as well. The choice to opt out entirely from the start, for any reason, would leave an indeterminate number of workers in their advancing years at serious economic risk, even those in good physical and mental health. Suppose they had no private pension plan from earlier years of work. Or suppose their plan had not done well and their wages were insufficient for the necessary savings. These circumstances would place all such workers at risk of being downsized or edged out of the economy indefinitely without their own system of support and also without adequate opportunities for many of them in the economy to alter their condition and attain a living commensurate with their competency or perhaps even a minimally decent living. Such a result constitutes a kind of risk and consequence that free

and able individuals would never experience in the original condition. Their choice in the original condition as free and able individuals was to decide to make their way and attain a decent living relative to that day, or not to do so, while retaining the opportunity and right of access to the resources needed to accomplish that end should they so decide. Preserving individuals' right of access to the resources needed to sustain such a living at a time of life when opportunities in the general economy are likely to become increasingly constricted for many of them, and doing so based upon their own prior employment, is a main function of Social Security.

Honoring that right, and relating it to individuals' labor for those who are able, is a necessary function within a society based upon freedom. On the other hand, it is difficult to identify an alternative that is capable of satisfying this function while operating in a manner that is significantly different from Social Security. One possibility would allow individuals to opt out beyond a certain point, perhaps somewhere below today's approximate $90,000 annual salary (coupled with a commensurately lower benefit to those individuals), provided that the contribution of each person remained sufficient to deliver a socially decent minimum to both themselves and other workers. It would be possible, too, for the standard beginning age of receipt of Social Security to be advanced somewhat more. In addition, the government could reconsider and stop spending the current Social Security surpluses. The government might then place those surpluses into investments, such as the kinds identified by the President's Commission to Strengthen Social Security perhaps backed by insurance, that might deliver a higher overall return to the system than the present return. Or the government could create individual personal accounts that function apart from and above the necessary minimum guaranteed to all. (It would be difficult to lower the bureaucratic costs of the program, which are around 1 percent of benefits, by very much.)

All the aforementioned alternatives are possible, and they could help to remedy future financial shortages facing the program, which are themselves subject to greatly varying estimates.[17] Those alternatives, though, lie closer to the edges than the center of the Social Security system. Assuring the necessary decent minimum to all based on the intended rather than the official poverty line, for example, would end up leaving only a very small fraction available for personal accounts, if that.

Currently, the chief weakness of Social Security from the standpoint of the guidelines of individual liberty, indeed, lies in the provision of this very mini-

mum. The basic Social Security benefit for longtime low-wage workers continues at about the official poverty line. But the official poverty line today no longer measures a socially decent minimum as it once did and was intended to do. For most workers on jobs with no private pension, about half of the workforce, private savings cannot bridge the gap between Social Security and a socially decent minimum because most of those jobs pay fairly low wages. Nor will private accounts necessarily do so, in any case, even for those workers who have them. If Social Security is to meet this standard, it will require devoting larger public expenditures to it, not smaller ones.

Welfare

During the past generation, no issue has troubled the public more than welfare and its reform. Want to arouse the public? Use the words *welfare* and *welfare entitlement.* The main issue that has occupied the public's mind centers on the matter of coercion. For most Americans, as for genuine freedom too, liberty calls upon able individuals to take responsibility for making their way. As many Americans saw it, here was welfare forcing them to pay taxes and then transferring those tax dollars to provide idle welfare recipients with unending entitlements. That system was doubly wrong in their eyes, because of both the coercion to pay taxes for the purpose and the incentive it gave to able recipients to avoid taking responsibility for supporting themselves.

Prior to 1996, welfare assistance in the form of Aid to Families with Dependent Children (AFDC) did entitle recipients to income benefits indefinitely with no requirement of regular employment. During the early years of the program, from its creation in 1935 to the early 1950s, single mothers frequently became eligible to enter AFDC as a result of widowhood. In addition, during those years the program was implemented in a context in which comparatively few women worked in employment. A scarcity of jobs for primary breadwinners in the economy was substantial, as well, both during the Great Depression and immediately following World War II. Then, women who did work might be thought to have taken scarce jobs away from primary jobholders for families, men who were either unemployed or were returning from the war. Most of those conditions changed over subsequent years. In the 1950s and thereafter, single motherhood increasingly arose from out-of-wedlock births or divorce, and employment became commonplace for women, even for single mothers with young children. In the wake of those changing conditions, pressure grew

for AFDC to reform itself, particularly to establish time limits and require its recipients to work. It is no coincidence that, as its connection to the four guidelines of individual freedom became ever more tenuous in people's minds, welfare spending assumed such a fundamental place in the debate, despite the fact that welfare itself accounted for only a small fraction of all social spending, less than 10 percent.

The guidelines of individual liberty call for reforming welfare to require time limits and employment under two conditions. Those conditions are that recipients are physically and aptitudinally able and that jobs capable of supporting a socially decent standard of living, including choices of such jobs, are available. Around the time of the reform of the program in 1996, both the minimum wage and the Earned Income Tax Credit had been raised appreciably. The result of this combination of actions, with the addition of food stamps, was to bring the earnings of a year-round full-time minimum-wage worker with two children approximately to or indeed slightly above the official poverty line. In addition, in contrast to the entire previous generation, jobs appeared to be well at hand. Unemployment nationwide had fallen to a generation low. In 1997, it dropped to below 5 percent for the first time in more than two decades. Not since the early years of the 1970s had that happened. With unemployment unusually low, a boost in the minimum wage, and rising wage subsidies added on top, sufficient opportunity appeared to be available, with the result that the reform of welfare would seem to be in keeping with the guidelines.

Yet that picture was highly deceptive. First of all, welfare recipients themselves had worked more than was commonly understood. Whether before or following 1996, welfare assistance often did not provide enough to live on. Many individuals on welfare already augmented their income through work that they didn't report. Sharita Hargrove, a welfare mother in Kansas City, told the *New York Times,* "I've been employed forever even if it was under the table."[18] And she was far from the only welfare recipient to supplement benefits through unreported work. Nearly 40 percent of other welfare mothers did much the same.[19] Nor, often, did leaving the welfare rolls turn into the solution to a better life. People like Linda Baldwin of Chicago tried. Prior to the reform, she quit welfare in order to take up a full-time position as a counselor in a youth center. Even in her third year of steady employment, sometimes working twelve-hour days, she was still earning $3,000 less than the official poverty line, by necessity relying on $5,000 a year in food stamps and housing subsidies. That assistance still didn't allow her to afford rent in a safe neighborhood. Nor could she pay for

the eyeglasses necessary for her son to read. Unable to afford the dental care she badly needed, she endured severely aching teeth every day.[20]

Of course, we have seen how the official poverty line itself has fallen well below the minimum level required for a socially decent living today, now better measured by the intended poverty line. Here, as we observed in Chapter 3, many present and former welfare recipients join a multitude of other workers in the economy, all of whom have been unable to locate jobs with pay allowing them to reach anywhere near the intended poverty line.[21] Quite a few former welfare recipients who are employed steadily full-time, like Linda Baldwin, are unable to reach even the official poverty line unless they receive considerable assistance from other sources.[22]

At bottom, the problem with the reform of welfare is neither the requirement of work for able welfare recipients nor the setting of time limits. It is instead the serious shortage of jobs in the economy that, even adding in wage subsidies, can sustain a minimally socially decent living at or near the intended poverty line through full-time work. That is why, suffering from the same paucity of opportunity, tens of millions of other American workers—though never on the welfare rolls—have proven equally unable to find jobs paying adequate wages, just like current and former welfare recipients.

The nation can assure adequate economic opportunity honoring the morality of freedom much more effectively than at present. It is possible to do so not only for welfare recipients but for all other American workers as well. Solutions are at hand, as we will see in Chapter 9.[23] Attending to the shortages in order to honor this societal obligation under liberty, though, will require strengthening and not reducing governmental intervention.

Might not the present programs, though, be costing more than is necessary? Couldn't they be implemented for less than we currently spend? In 2000, welfare, SSI, and other direct public assistance (outside foster care and day care), together with in-kind benefits to welfare and SSI recipients, cost approximately $86 billion. Allotting 15 percent to administration, the programs spent approximately $73 billion on a total of 6.7 million households, or about $10,900 per household. That amounts to less than 50 percent of the $22,300 in income required for the recipient household of median size to reach the intended poverty line. And, of the expenditures per household devoted to welfare, some portion of it went to instructional and other costs involved in the work, job-training, and job-search programs. About half the households on welfare and SSI were lifted to or above the official poverty line; hardly any reached the

intended poverty line, no matter whether they were regularly employed or not. Given that most of the programs themselves acknowledge the inadequacy of the official poverty line and accept the need for something substantially higher, it is difficult to see how lower spending on any major order of magnitude could occur here.

Alongside problems relating to attaining a minimally adequate income, there is another serious shortcoming of the opportunity available through low-wage work. This shortcoming has to do with the ability to secure access to adequate health care by way of work. The vast majority of the approximately 40 million individual Americans who have no health insurance coverage are either employed workers or in the families of those workers. Most of those workers occupy jobs paying below-average wages. Lacking insurance, many of them wait until health conditions deteriorate and then (if at all) make use of hospital emergency facilities, often with the public covering the bill. Many elderly, also, can afford health care only because of Medicare, needless to say. Government spends about $540 billion annually on health care, the preponderance of it on the elderly, on low-income families not in jobs or working in part-time or unreported jobs, and on precisely the emergency care just described. I return to the problems of health care as they relate to both affordability and economic opportunity, as well as causes of those problems and cost-effective solutions, in Chapter 6.

Two Final Counterarguments

Two other powerful arguments that we commonly hear deserve attention at this juncture. They each claim to offer a more effective general approach that will meet the obligations of freedom but with considerably less need for government than the programs we have been discussing. Both arguments implicitly accept the obligations. However, they posit that reduced governmental intervention must first occur in order for the nation to be able to create the conditions that can live up to the obligations, or at least come closer to fulfilling them.

Let the Free Market Work Its Job-Creating Wonders

If opportunity is woefully deficient in the economy, one line of argument holds, the problem might lie not so much with the economy itself as with the overwhelming burdens that the government places on the economy. The econ-

omy might have ample power to turn the scarcity of opportunity around if hundreds of billions of dollars in annual governmental spending and associated regulations had not sapped and eviscerated its energies. "[Economic] growth is the answer to all of our problems," Stephen Moore, president of the Club for Growth, says.[24] Move the government out of the way, call upon the nation's enterprising spirit, and the economy might be able to generate the needed opportunity.

Approximately two-thirds of all jobs in the economy offer year-round full-time employment paying a minimally adequate wage.[25] Out of 1.7 million jobs, that is, about 1.1 million of them will be of the kind just described. Moreover, with each year comes a net added demand for adequate jobs of about 1.1 million workers arising from the formation of new households (minus retirements) and second earners wanting and occupying these jobs. The general economy must thus create about 1.7 million jobs per year in order to keep pace with the new demand for adequate jobs.

From 1990 to 2000, the United States delivered the finest job performance, by far, of any major economy in the industrialized world. The desire to find and copy the American formula was everywhere in the air, across the globe. Over that decade, we averaged a net addition of 1.7 million more jobs per year. This is approximately what was needed simply to keep up with new demand for adequate jobs. In addition, the economy spawned a real wage increase of about 10 percent for the bottom one-fifth of workers, enough to fashion approximately 3 million additional adequate jobs, with benefits, beyond new demand. Three million adequate jobs beyond new demand over the ten-year span, though, pales when compared with the approximately 25 million distressed workers with whom the decade of the 1990s began.

Now perhaps it is more understandable why, despite the economy's unequaled performance in job creation, the proportion of distressed workers in the labor force managed to drop by only three percentage points over the decade, from 19.6 percent at the start to 16.6 percent at the end. At the very top of the business cycle in 1999, in the nation's longest economic recovery ever and prior to the onset of recession, about 23 million American workers still remained unemployed, or occupied part-time jobs owing to the inability to find adequate full-time work, or held year-round full-time jobs paying below an adequate hourly wage.

How well might the economy be able to do, optimally? Generating an average of 2.5 million net new jobs yearly over the span of a whole decade would

constitute a truly breathtaking performance. Such a result, maintained for ten straight years, would far surpass the performance from 1990 to 2000, which generated 1.7 million added jobs per year. It would surpass even the great Clinton years from 1992 to 2000, when the economy generated an average of 2.1 million additional jobs annually, which everyone agrees was an extraordinary performance. Yet a still better record of 2.5 million net new jobs each year continuously for ten straight years (with no slowdown or recession) would end up addressing the economic plight of barely one in three of the number of workers who are distressed.[26]

Economic growth is highly desirable. Strong sustained growth can ameliorate the gaping scarcity of economic opportunity. It will surely prevent the shortage from worsening yet further. But it will not be able to resolve the problem by itself, not nearly so, not even breathtaking growth, unless accompanied by substantial wage and benefits subsidies and an array of other public actions. Nor is there good reason to expect otherwise. A free-market economy has economic efficiency based on supply and demand as a top goal (a prolonged surge in the supply of labor thus will tend to reduce wages, for just one example), not adequate opportunity whether understood in terms of attaining a socially decent minimum living through work or the ability of individuals and families to improve their living through improving their work.

Government Social Assistance and the Poverty Trap

For some observers, the issue of economic opportunity as a cause of poverty is beside the point. Poverty instead results from perverse incentives facing the poor, incentives made perverse by the very social policies of government.[27] Before reforming welfare in 1996, government essentially gave money to single parents without establishing time limits or setting any firm conditions about employment. Doing so, critics claim, fostered dependency along with a variety of other dysfunctional behaviors. Those behaviors included single parenthood itself, illegitimacy, and erratic work performance, among others, all of which turned back on themselves to result in continued poverty. Welfare assistance became a poverty trap. The welfare mother who had three, four, and five children so as to continue entitlement to assistance, all the while working little, if at all, was the proverbial example.

Prior to its reform, welfare at its height enrolled just over 5 million adults (the families of welfare recipients, on average, contained approximately two children). The number of adults on welfare came to barely one-fifth the overall

number of distressed American workers at the time, described in Chapter 3. Like welfare recipients, a majority of distressed workers also proved unable to lift themselves to a better life. What, we must ask, enmeshed all these other workers and households, tens of millions of them? Substantial numbers of Americans found themselves to be economically trapped, that is, *whether they were on welfare or not.*

Not surprisingly, the very same scarcity of opportunity affecting many millions of other workers also had a powerful impact on welfare recipients once they left the welfare rolls. Most former welfare recipients have been unable to find decent-paying work in the job market, a situation no different from that before the reform or for all those other workers. In a reasonably typical area of the nation, urban Cuyahoga County in northern Ohio, welfare caseloads dropped dramatically between 1996 and 2001, from about 40,000 to around 20,000, just as happened elsewhere. At the time, an adequate wage needed to reach the intended poverty line was about $8.75 per hour. Yet, while most former welfare recipients did take full-time work, barely 32 percent of those finding work had located a job that paid even as much as $7.50 per hour. The rest worked full-time at still lower wages (another 45 percent) or occupied part-time jobs.[28] Across the nation, most welfare recipients had similar luck. Despite working, they have experienced modest reductions in poverty.[29]

The reform of welfare has ignored this vital problem not simply for welfare recipients but for low-wage workers generally. Under a policy of freedom, low-income individuals are entitled to help when there is a shortage of adequate opportunity, help furnished in a respectful manner. If sufficient numbers of jobs do exist at low wages, assistance follows principles that engendered the reform of welfare, with two crucial caveats. The assistance must assure that full-time work will lead to a minimally socially decent living; also, the assistance must be implemented in a way considerate of the dignity of the recipients.[30] If it provides a minimally decent living in a respectful way, such assistance actually adds incentive for recipients to become regularly employed rather than to be unemployed (or to engage in other, nonlegal activities), for it effectively raises the monetary return from the former path relative to that of the latter.[31]

Conclusion

Genuine freedom involves us in a series of mutual obligations necessary for freedom to exist and be morally sustainable within its own terms. As we saw in

Chapter 2, those obligations derive from the method of reasoning of the historical liberal tradition of thinking about freedom found in Locke and parallel conclusions contained in republicanism. That thinking is embedded in the vision of many of the Founders and reflected in the transcendent words opening the Declaration of Independence and other similar documents giving birth to the nation. The obligations are substantial ones. Among other things, they call for the assurance of sufficient economic opportunity enabling individuals to attain a dignified economic standard of living by way of their efforts, through choices of openings and positions adequate enough to address issues of dependency. They also call for individuals to be able to improve their level of living by improving their work. Honoring the obligations justifies collective societal action where opportunity appropriate to freedom otherwise falls short. Spelling out the application of the obligations in a manner consonant with freedom is what the four guidelines described in this and the prior chapter have been about.

Today the social policies of government cover a dizzying array of areas and expend about $1.8 trillion annually, including health care. Such spending may seem elephantine, entirely out of place, if we take seriously the proposition that freedom requires a minimalist government. Yet nearly all the major programs follow within terms defined in the four guidelines. Where they depart from those guidelines, it is not so much because the programs are too coercive or overly ambitious. To the contrary, rather than being excessive, the programs tend to fall short of honoring the obligations regarding opportunity, sometimes dramatically so. That deficiency of action applies, among other places, to the availability of employment in the economy able to support a minimally decent living through work as well as deliver a better living through improved work; the level of educational opportunity available in many low-income areas; the ability to attain a minimally adequate income during older age through Social Security coupled with private savings; and the access of workers and their families to health care coverage through employment. If anything, this is to say, government's presence and its social policies have been and remain timid relative to what the moral obligations of freedom, grounded in sustainable reasoning, actually call for.

The reasoning behind genuine freedom reflects a deeply felt norm in our culture, expressed in the American Dream and going back to the Founders, that there should be enough opportunity in our nation for all individuals who work hard and persevere to attain a dignified economic standard and improve their living. Perhaps for this reason, even where the social policies end up falling

short, those same policies often claim to enable working individuals to lift themselves out of poverty, using the official poverty line as a standard. By way of contrast, the policies make no pretense to subscribe to the defective free-market notion of liberty. They greatly surpass the minimalist societal action that that view can support, absent the introduction of other extraneous values ultimately inimical to liberty. They do so even though no right to the availability of adequate economic opportunity appears in the Constitution. Yet, absent that right, the whole project of individual liberty in a society that sanctions and protects private property can rest only on dubious moral grounds within the logic of freedom itself.

All the same, the present policies fall short of actually honoring the obligations.[32] They fall short, that is, unless we are willing to think in the constricted perspective of free-market freedom, which cannot be defended within the reasoning of freedom, even within the terms of its own reasoning process. The policies that are needed if we are to honor the obligations, the barriers that stand in the way today, and how to overcome and remove those barriers are considerations taken up in the book's final two chapters.

The social policies themselves, of course, are meant to address one broad set of obligations that freedom entails. Beyond those obligations are a number of others that we have to each other under freedom. So, the story has just begun and taken us through its first act. It is to the other obligations—the rest of the story about what freedom means and asks of us—that we now turn.

CHAPTER FIVE

Freedom and Our Protection from Wrongful Harm

A former neighbor of mine enjoyed giving parties. They were not quiet get-togethers, and they weren't limited just to normal evening hours. I know it sounds like a small thing, and I understand that my neighbor has a right to have parties. But the noise often kept me and other members of my family, including my small children, awake through the early hours of the morning. What does the idea of freedom permit? Does it allow my neighbor to have such parties? It *is* his own property, after all. Or does freedom mean that my family and I should be able to get to sleep late at night and into the early morning on our property? Where does the personal autonomy of liberty end and the duties that liberty places on us begin?

The obligations we have toward one another under liberty go well beyond those related to economic opportunity. The ones most of us would probably think of first, in fact, concern the basic responsibility we have as individuals to refrain from harming others wrongfully. Ours is a free country, but an individual's freedom does not extend to wrongfully harming others. Most of us learned this principle as very young children. We accept it almost reflexively.

What does the principle ask of us, however? To what degree must we take

others into consideration? How far does the duty extend, and what are the implications? Each of us frequently faces questions about wrongful harm and what it means, ranging all the way from a neighbor's noise or unsightly yard to products that fail to perform as expected; from problems of safety in the workplace to issues about fraud, negligence, or liability; and from defining acts of deception and deceit to an ultimate question like whether taking the life of a prowler inside our home constitutes murder. Barring an ability to reach voluntary private agreements that settle these sorts of issues, which we sometimes are able to do, differences we have can be resolved only collectively, through society, which generally means through the political and judicial mechanisms of government.

The principle that we cannot wrongfully harm another with our freedom is satisfied, obviously, if no wrongful harm occurs. It is also generally satisfied, though less completely so, when individuals who commit wrongful harm of a criminal nature are brought to account or those inflicting wrongful harm of a civil nature satisfactorily compensate those harmed such as to restore them to their former condition. The focus of this chapter is on wrongful harms of a civil nature, especially those kinds of harms we experience in our everyday lives. What obligations do we have to others under freedom here? How wide do they reach? Where and to what degree must we come together and work collectively as a society if we are to honor the obligations and safeguard freedom?

The Invisible Hand

Not so many years ago, we had little protection against large motor vehicles that flipped over, playpen padding that could immolate a child, or birth control devices whose failure resulted in infections and spontaneous septic abortions. That state of affairs changed, largely during our own lifetime and that of our parents, in the wake of a variety of laws and court decisions regulating consumer products. Yet is it really the case that government intervention was so necessary in these instances?

Alternatives to governmental action exist, particularly concerning the control of injurious economic activities, that sometimes seem able to lessen harm to individual Americans more effectively and in a way that is more in keeping with freedom than collective action through government can.

As with meeting the obligations of economic opportunity, proponents of

free-market liberty say that the free market may be more effective in lessening wrongful harm than the government can be. If my business produces a lipstick that results in nasty blisters, I'm likely to lose my customers and profits pretty quickly—which points out how the forces of the free market will operate to weed out irresponsible companies. Letting competition in the private market work naturally might reduce safety hazards such as my lipstick more effectively and more cheaply than government can through regulations. The costs and restrictions that regulations impose could possibly have the opposite effect. They could delay for years the entry onto the market of new and improved lipsticks and salves that might better protect our lips from the effects of sun or deliver other useful benefits.

This is not to mention the seemingly absurd regulatory actions that the government sometimes takes, such as when Mother Teresa and the Missionaries of Charity were forced to stop building a homeless shelter in New York City. They had to scuttle their plans because they couldn't get around a provision of the city's building code requiring them to install particularly expensive elevators they couldn't afford and felt were unnecessary.[1] The very regulations intended to safeguard us can end up depriving us instead. Proponents of smaller government contend that far from protecting liberty by enforcing the mutual obligations toward one another that liberty places upon us, governmental regulations cause the market and philanthropy to perform poorly and inefficiently. In the end, regulations may harm the very persons whom they claim to benefit.

Wouldn't emancipating individuals from governmental regulations and letting the free market operate through voluntary exchange be more compatible with a core imperative of liberty, that is, to free individuals from coercive external restrictions? And might this not at the very same time be a more effective way to satisfy our mutual obligations under liberty to refrain from doing wrongful harm?

Relying upon the competitive free market in this way entails a number of fundamental problems, though. Those problems limit the free market and ultimately undermine its ability to satisfy the morality of liberty as concerns wrongful harm. Consider the case of Tom Brayton, whose twenty-month-old son Nicolaus died three days after eating contaminated meat the family bought in the summer of 2002. When people die as a result of wrongful harm caused by products sold on the market, there's little solace in knowing that the producer or seller might lose customers and profits to competitors and perhaps eventually be

forced out of business as those harmful effects become more widely known and understood. "The one thing I remember the most," Mr. Brayton said, "is Nicky's screaming nonstop for three days, and there was nothing I could do."[2]

Wrongful harm is not acceptable in the moral reasoning of liberty. It constitutes a deprivation of liberty, surely so unless there is satisfactory compensation to the harmed individual able to restore his or her former condition. Individuals who have acted responsibly and exercised due diligence should be free from injurious actions by others beyond a reasonable level of risk we all assume. Competitive market forces can only reduce or prevent wrongful harm in the future; in and of themselves, they have no power to restore an individual's former condition and compensate for harms that have already occurred or that are now in the process of occurring.

There may be instances in which no compensation will do, in any case. Think of Nicky Brayton's life. What compensation is there to a small child who has died? Or to his parents? Or to individuals rendered unable to have their own children because of flawed birth control devices? Philip K. Howard, the well-known critic of regulation, himself says of victims who die: "Their loss can never be satisfied."[3]

Even in cases in which monetary compensation makes sense, companies will have their limits. They may go bankrupt and leave the individuals they harmed only partially compensated or not compensated at all. When the Dow Corning Corporation emerged from bankruptcy in 1999–2000, it did so by gaining federal court approval of a plan to settle claims against its gel breast implants with a total cap averaging less than $20,000 per claim. The settlement also disallowed future lawsuits on these or any other related claims against Dow Corning's corporate parents, the Dow Chemical Company and the Corning Corporation.

We are told that competitive market forces create incentives to reduce harm because those who offend will lose customers and profits. Yet without strong laws or regulation, the very real possibility exists that producers will profit handsomely from harm that they have inflicted. Although their companies may ultimately go bankrupt, some or many of their executives, during whose tenure the harm occurred, remain free to cash in before the collapse and end up multimillionaires, as the experiences of Enron, Touch America, and a long succession of other companies like them have shown all too vividly. The same can be said for large investors in companies like those, who can make a pretty penny if they cash in before the collapse. And some companies that declare bankruptcy have a way of then springing back to life with still greater resources

than they had before, when they were solvent. The self-interest incentives of the free market are supposed to reduce wrongful harm efficiently and effectively. Absent strong laws and regulations, though, they do not necessarily operate that way in real life.

The same questions about the free market's ability to deal with wrongful harm in a way that comports with individual liberty often also apply to a second alternative some free-market advocates propose. This second alternative is to supplement the consequences of the free market with the possibilities of civil litigation through the courts. The right to go to court must always remain. However, like the free market, the courts can operate only after the fact. Litigation cannot compensate after the fact for the uncompensatable or for businesses that go bankrupt with the result that they are unable to compensate. Except for cases of class actions, the transaction costs of litigation against a business or other perpetrator may well render many claims of individuals for $15,000, $20,000, and more prohibitive through the courts in any case. Even class action suits may end up providing very little compensation to those harmed after the subtraction of litigation costs.

Another consideration is that jokes about lawyers and the courts actually rival those about politicians and regulations. Fear of expensive lawsuits and unpredictable court awards for hundreds of millions and even billions of dollars led one southern California school district to ban running on playgrounds—can you imagine? Similarly, such fears caused a producer of baby strollers to include a warning: "Remove child before folding."[4] To be fair, though, one must ask whether court awards fining a company in the hundreds of millions of dollars are so obviously out of line and really all that punitive if they are equivalent to perhaps only a few months' worth of the company's profits.[5] Even were they immense enough to be economically punitive, however, awards against a company coupled with market consequences would not deprive either executives or investors who bail out earlier (or very late when they have protected their property against civil suits) from profiting handsomely from harm that their company engaged in. They would end up profiting, that is, unless the companies were somehow able to be prevented from these activities. Laws that are specific about what is and what is not permissible, and are rigorously enforced, have that function. In their absence, both free-market forces and civil litigation in the courts, even when combined, contain serious shortcomings with respect to satisfying the mutual obligations we have under liberty to refrain from wrongfully harming one another.

Is Regulation an Answer?

The need for effective laws brings up the subject of regulation. Regulation has the objective of spelling out what is and is not permissible, monitoring and enforcing those practices, and in so doing attempting to control and curtail wrongful harm before the fact, as much as possible. Using regulation to address wrongful harm has proven costly. Enforcement and adjudication of the criminal law (having to do with murder, rape, assault, theft, fraud, extortion, and the like) consumes about $135 billion a year.[6] Add to this the costs of administering economic and social regulation—the expense to carry out regulation ranging from consumer product safety and environmental pollution control to workplace health and highway safety—and the annual total comes to between $170 billion and $205 billion.[7] The midpoint here is approximately $185 billion yearly. Yet this expenditure, too, represents just a start, the bare tip of a far larger iceberg. The great majority of the costs of economic and social regulation are indirect, known as compliance costs, such as the costs it takes to make buildings handicapped-accessible in order to comply with disability regulations or the costs involved in making pill containers childproof. Compliance costs are generally paid by businesses and consumers rather than directly by government. Difficult to measure, the estimated costs necessary to comply with regulations at the federal level alone may exceed $700 billion per year.[8]

The very cost and extensiveness of regulations raise an obvious question: What protection do producers, workers, and consumers have from overbearing rules and the state's pernicious use of the power to regulate? The definition of a wrongful harm is itself pretty open ended. Suppose a company produces a shampoo that it puts through a series of tests but not the more costly ones. After a few years, a highly disproportionate number of young men who have purchased the shampoo find that they lose their hair and become bald. Did production of that rinse for sale constitute a wrongful harm? How about if fuel companies reduce their inventories to lower costs and boost profits but leave insufficient supplies on hand for customers in winter should a deep, prolonged cold snap come along? Or if your next-door neighbors want to enlarge their house in a manner that blocks all sunlight from entering your home and back yard? Do any of these constitute wrongful harms? Do all of them? What defines the boundaries of our autonomy that we can legitimately expect others to respect?

Enormous disagreement occurs over how to answer questions such as these. Indeed, there is no one "correct" or "scientific" answer to any of them. They are

far from the only kinds of questions that have no single "correct" answers, either. Since we benefit from exchanges taking place in the market, we are presumably willing as individuals to take some risks. Each time we drive a car or fly we accept some extra risk, often not easily calculable. What level of risk is it reasonable to expect individuals to take beyond which wrongful harm occurs? And what does the obligation of due diligence on the part of individuals entail? How careful must we be? If, for example, an individual contributes in any way to a harm befalling him or her, is that individual then entirely responsible or only partly responsible and deserving of some consideration? Or, if a producer tries to divert your attention from the perils of a product through tens of millions of dollars of advertising, is the producer not responsible at all for any harms that come? Again, there is no one correct answer.

With no single answers as to what defines the expectations we legitimately have regarding our autonomy, or what constitutes reasonable risk and reasonable due diligence, both the level and kind of regulation are quite likely to change over time as our ideas about legitimate expectations, risk, and due diligence change. Given that there is no single correct view, the answers, in the end, must inevitably arise through discourse and evolve through the political and judicial processes of government.

Costs and Benefits

If the answers to the most basic questions are open ended and depend upon political and legal judgment, though, what can protect producers, workers, and consumers from the government's going too far and enacting unnecessary, overbearing regulation? There needs to be some method to determine whether the government's regulatory actions are appropriate and within proper bounds of our freedom or are themselves excessively intrusive. We need a good principle to identify excessive regulation.

Perhaps the most popular candidate for such a principle holds that the benefits from regulations should be compared with their costs and that only regulations whose benefits exceed their costs are appropriate. Certainly, at first glance, this principle makes simple common sense. More than that, it seems to formulate the issue of acceptable as opposed to excessive action in fairly quantifiable and objective terms (benefits and costs). It thereby seems to avoid much need for political or legal judgments.

But it does not. First, though, I should note that the nation's economic and

social regulations concerning wrongful harm, taken as a whole, probably do comply with the cost-benefit principle according to standard measures. A 1996 review of all cost-effectiveness studies of regulations containing national estimates in terms of lives saved found that the total direct and indirect costs of the regulations for each estimated year of life that these regulations saved averaged approximately $36,100 per life-year.[9] The analysts went on to cite estimates of the value individual Americans and the society place on a saved life-year according to wage-risk trade-off studies. The regulatory cost of $36,100 comes to one-half of those estimates, or even less.[10]

The most comprehensive analysis of the impact of economic and social regulations up to 1990 (including regulations going outside health-related concerns) came up with a range of total benefits and total costs, finding that the overall benefits of regulation roughly matched the overall costs.[11] A later study covering only regulations enacted in the past decade suggests that the picture may have changed in a negative direction.[12] Even here, though, cost-benefit studies commissioned through the government challenge this conclusion, finding that average benefits of those regulations exceeded average costs by a decided margin.[13]

Criticisms of regulations often refer to particular individual rules and the egregious excesses of those particular rules. Total benefits and total costs for all regulations taken together, even if acceptable, say nothing about any single regulation. Studies have found that some individual regulations create costs hugely exceeding their benefits as examined by conventional measures. Analysts Tammy Tengs and John Graham point out: "We regulate potentially carcinogenic benzene emissions during waste operations at a cost of $19 million per [single] year of life saved."[14] Regulating the flammability of children's clothing, the analysts observe, cost $1.5 million for each year of life saved, still a pretty tidy sum it would seem.

Here we come to the rub of the difficulty, though, where the door to political discourse and debate opens widely. The costs and benefits of any individual regulation, or of all the regulations taken together, depend upon the particular costs and benefits taken into consideration in the analysis and upon how they are measured. Different methods of measurement, all professionally reputable, can yield very different results. Is saving lives today worth more or less than, or indeed the same as, saving lives ten or twenty years down the road? And how can we be so certain, anyway, as to how many individual lives a particular regulation saves, whether now or in the future? Different answers to these two

questions alone, former Harvard University president Derek Bok tells us, "can cause estimates of cost-per-life-saved to vary by a factor of ten, one hundred, or even one thousand."[15]

In April 2002, Abt Associates, Inc., a technical consulting firm, completed a report for the Rockefeller Family Fund on the health effects of pollution from power plants. Its report estimated that pollutants such as sulfur dioxide and nitrogen oxide emitted from eighty-three power plants that the firm analyzed cause the deaths of about 6,000 Americans annually. In addition, they result in as many as 140,000 asthma attacks each year and 14,000 cases of acute bronchitis. Those eighty-three plants total just a tiny fraction of all power plants in the nation. Remember how Derek Bok pointed out that differences in methodology can cause estimates "to vary by a factor of ten, one hundred, or even one thousand." In this case the difference is *infinite,* for spokespersons representing the utilities referred to dozens of other reputable studies that they say "find no association between sulfates from power plants and health effects."[16]

Then there's the matter of which benefits to include other than lives saved or injuries averted. How much is the "look" of clean air worth? What is the value of a historic site or the feeling of being safe and secure? Are new discoveries and more efficient production processes that may come from meeting the regulations to be included in the benefits, and how do we place a value on them? When we are told that regulating the flammability of children's clothing costs about $1.5 million per life-year saved, seemingly a lot, might some not reasonably think, "Yes, but we're talking about tiny children here and the harrowing deaths they experience. Their lives are entirely ahead of them, and they are not the ones who choose the clothes they wear." Similarly, when we hear that regulating benzene emissions in waste costs $19 million per life-year saved, might some not say, "Yes, but those deaths are forced on these people, completely unawares, and they very often suffer slow, brutal, and despairing deaths"? Is it the case that every life-year saved has the same value, or do those of children, of individuals who have no free choice and no way to protect themselves, of individuals whose deaths will be particularly agonizing, or of individuals who earn more or who earn less have a different value?

And what about the financial costs the regulations impose? It's easy, relatively speaking, to determine the bureaucratic costs of regulation by looking at the budgets of agencies. It's considerably more difficult to figure out how to find and total the many compliance costs that thousands upon thousands of producers, workers, and consumers bear. Just think about the kinds of questions

raised by environmental regulations establishing the average miles per gallon that a producer's fleet of automobiles must achieve. Suppose those regulations for automobiles are amended to fully extend to sports utility vehicles such that many drivers decide to switch from them to lighter cars. According to some, such a result can be expected to increase the incidence of deaths on the road. Assume that to be true, which is itself subject to some dispute. Should a factor like this be included as a cost? If so, how should we value that cost? And would the value of that cost change if manufacturers plausibly could have avoided much of it in an affordable manner by using fuel-efficient technologies in the rest of their fleet, or indeed in the SUVs themselves? Costs, like benefits, have a way of evading definitions that we all agree upon.

So many questions, and the answers to many, if not all of them, involve value judgments as well as our feelings. They are essentially political and not scientific issues. Cost analysts tell us that we can become more cost-effective if only we "abandon old ways of thinking. For example, the common inclination to invest resources in the most worrisome health problems, the problems affecting the most people, or the most effective solutions will not maximize health gains, given limited resources."[17] Should we really care solely about maximizing health gains and not care about the most worrisome health problems, or the problems affecting most people, or the most effective solutions? Perhaps, or perhaps not, or perhaps some combination. Whichever, it is clearly a *political* kind of choice and thus ultimately a political decision. Cost-benefit analyses (and tests of cost-effectiveness, also) do not bring closure but leave us still very much in an open-ended political world without a way to set firm boundaries able to define and contain overreaching laws and regulations.

In any event, something much more basic than weighing benefits and costs is needed to restrain regulations. For, in and of themselves, benefits and costs give no priority to individual liberty. Violating the liberty of some individuals for the greater benefit of others might well be able to pass a cost-benefit test, unless liberties were somehow treated differently than other benefits and costs. It's conceivable, even, that regulations expressly calling for the death of particular innocent people would pass a cost-benefit test,[18] as they also would a cost-effectiveness test, a version of cost-benefit analysis that asks whether a specified end is attained at the lowest cost given the available alternatives. Unless liberty is viewed as an end and sets clear limits as to the means, neither cost-benefit analysis nor cost-effectiveness tests will take any special notice of liberty.

A Reasonableness Standard

Any standards meant to keep regulation within limits that are proper to liberty must themselves derive from principles of liberty. Such a standard might be called a "standard of reasonableness." To be appropriate, according to this standard, laws and regulations must remain within the bounds of reason, using the idea of individual liberty as the point of reference to define reasonableness. Our nation's courts often use a standard of reasonableness to examine laws and regulations and to place boundaries on them, though the courts do not apply the whole standard in a number of areas and the standard itself, like the cost-benefit principle, remains open to varying interpretations.

A reasonableness standard takes us back to the obligations we have toward one another under liberty—the obligations that give liberty its meaning and transform liberty from the amoral to the moral. On the one hand, we have an obligation to respect one another's person and property, including the autonomy of action of each individual with regard to his or her person and property. Respecting others' autonomy at the same time obliges us to assume some risk if we engage in activities from which we hope to benefit. It also obliges us to exercise reasonable due diligence in protecting ourselves from the actions of others and to ask others to respect our autonomy to the degree, and only the degree, that it is legitimate for us to expect. By the same token, as we exercise our own individual autonomy, we have the obligation not to injure others. We are to avoid imposing harm on others reaching beyond the reasonable risks others assume toward us and their own exercise of due diligence or violating the expectations they legitimately have of their own autonomy.

The obligations we have to one another suggest a number of conditions that laws and regulations concerning harm must honor in order to stay within the bounds of reason and meet a standard of reasonableness. For example, laws and regulations government enacts must address a real issue of wrongful harm in order to be enforceable. They must not restrict or interfere with activities that raise no such issue. Second, the means that the laws and regulations use must be directly relevant to controlling the harm they seek to address. In addition, there can be no less restrictive means known and available surely able to attain the same level of control of that harm. Finally, the laws and regulations must distribute their costs fairly, both the costs of compliance and any other costs that compliance may place on bystanders. Courts often use these kinds of principles

of reasonableness in determining whether laws and regulations are appropriate or excessive and thus illegal, that is, whether they violate the Constitution.

Harmful Effect

Let me expand on the point briefly and provide a few examples in order to describe how a standard of reasonableness works, how it seeks to get at the mutual obligations under freedom that we will be called upon to honor in our daily lives. In applying a standard of reasonableness with liberty as its touchstone, clearly the most elemental consideration is that regulations concerning harm must direct themselves to a real issue of harm. Are individuals actually harmed and in a wrongful way by others' activities? Courts will require that an elected body's or agency's belief that harm is involved, and that the harm is wrongful, be a reasonable one, or what the courts sometimes call "fairly debatable." Fairly debatable means that credible logic and evidence exist to support the elected body's or agency's conclusion that harm is occurring that is wrongful.[19]

What qualifies as wrongful harm? When we think about wrongful harm, we often think of actual physical harm absent provocation, involving ill effects to life or health, or monetary loss, or other damage to property. Wrongfully harming another does not stop at actual physical harm, though. It may well include creating nuisances, disturbing the peace, marring scenic beauty,[20] fostering fear for one's own gain,[21] anything involving harmful effects in which individuals have legitimate expectations of others.[22] It may even include harm that an individual inflicts primarily upon him- or herself. Just think about regulations that ordain seat belts when driving. When regulations requiring producers to install seat belts in automobiles were first debated, a common view held that an individual's decision about seat belts affects only him- or herself. It does seem that persons who refrain from wearing seat belts are putting only themselves at risk. Yet individuals who become severely disabled or who die for the lack of wearing seat belts may leave others who legitimately depend upon them unprovided for (young children and other family members, for example). Or they may place unfair choices and burdens upon others (if, for example, they lack adequate health insurance and so become dependent upon others' resources or upon the public's). It would not be unreasonable, in point of fact, to define the wearing of seat belts as an exercise of due diligence, which others have a right to expect from all individuals.

Even though it is broad, however, the definition of wrongful harm is not and cannot be infinite. We can see the difference between wrongfully harmful ac-

tions and those that are not through the illustration of what are sometimes regarded as the most pernicious governmental infringements on the economic liberty of individuals, zoning regulations.

Zoning regulations restrict what property owners can and cannot do with and on their own land. Regulations concerning the use of various forms of property are nothing new. Indeed, they are as old as the Republic.[23] But a precedent-setting Supreme Court decision dealing with zoning came in 1926.

In the *Village of Euclid v. Ambler Reality Co.* (272 US 365, 1926), the Court ruled that zoning regulation did not amount to an illegitimate restriction on the liberty rights of property owners. The case focused on zoning restrictions that prohibited industrial uses on the zoned land. The Court based its decision on a number of interests of the owners of the neighboring properties, arising from expectations they legitimately had and that the zoning regulations endeavored to protect. Those expectations included protection from safety hazards—especially to children—associated with large increases in traffic; from the growth of disturbing noise and crowdedness caused by industrial developments coupled with the increased traffic congestion they generated; from the ability of those effects taken together to transform the character and peacefulness of the surrounding neighborhood; and from the plausible negative consequences that all those considerations were likely to have on the economic value of the properties. The Court concluded that the combination of those harmful effects on the neighbors' security of property, fairly or reasonably understood, were wrongful. It also concluded that zoning restrictions the regulations placed on the use of property, intended to reduce those effects, were indeed relevant to reducing them—that, to use the Court's words, a "fairly debatable" case existed that zoning was an effective means to attain an appropriate end.

A "fairly debatable" standard, however, cannot simply become a code word that allows governing bodies to place any and all restrictions they desire on the use of property, that allows anything and everything to be treated as wrongful. Consider, for example, zoning restrictions that permit the use of land for apartments but then go on to prohibit the building of apartments designed for group living in which residents from different units share facilities. The governing body must make a "fairly debatable" case that apartment dwellings intended for group living constitute a wrongful intrusion into the property or lives of the surrounding neighbors and that this wrongful intrusion does not arise in the cases of residents of apartment dwellings without shared facilities. If the governing body cannot make such a case, courts should find such a restriction on

property use to be arbitrary and illegitimate. And the same is true for regulations restricting actions that harm other individuals only if those individuals do not exercise reasonable due diligence as well as actions in which the incidence and extent of harm do not surpass the risks we all reasonably assume.

Is the "fairly debatable" standard that the courts use sufficient to define reasonableness? Is it tough enough? A stricter standard of reasonableness might require that a clear and convincing or compelling case rather than a fairly debatable one be made that the behavior in question results in a harmful effect. Under any stricter standard than a fairly debatable one, the ability of individuals to enjoy security from wrongful harm, which is a liberty right, and successfully claim that their zone of liberty has been invaded would be significantly curtailed. Even if individuals were being harmed, the support of as much logic and evidence as opposes the case would be insufficient for them to attain a remedy. That is, the right of security from wrongful harm, in effect, would be given inferior status relative to the right of another individual to the use his or her property without restraint.

Where autonomy in the use of property vies with security from wrongful harm, "fairly debatable" is a proper standard of reasonableness to require for elected bodies and agencies to intervene.[24] Only when vying liberties are not at stake or when there is cause to accord a particular liberty or set of liberties higher status relative to other liberties, as might be true with the areas of speech or conscience, would a requirement for a clear and convincing or compelling case for governmental intervention be appropriate.

Relevancy of Means and Use of the Least Restrictive Means

If a wrongful harm exists, regulation must then use means that are related to controlling the harm and that also constitute the least restrictive measures available and known able to control the harm. As the *Euclid* zoning decision illustrated, regulations must employ means that are relevant to the harms they address. In this case, the Court found not only that industrial uses posed a harm to the owners of the neighboring properties that was wrongful but also that the zoning regulations employed were reasonably related to controlling the harm.

Requiring use of the least restrictive means is a different matter, though. The least restrictive means can be those most respectful of the autonomy of the individuals regulated consistent with controlling the harm as effectively. Or it may be a less costly means able to attain the same effective control. For many years, for example, an individual's freedom of contract was considered sacro-

sanct. Then, in 1937, the Court found that a minimum-wage regulation constituted an appropriate limitation on the freedom of contract (*West Coast Hotel v. Parrish,* 300 US 379, 1937). It reached this conclusion by arguing that other considerations of importance to freedom existed alongside our freedom of contract, including the availability of opportunity for individuals to provide a basic living through work. In sanctioning minimum-wage regulations here, the Court implied that a limit existed. The ruling suggested that the imposition of a minimum wage set above that required to attain a basic living standard, as fairly understood, would be unnecessarily restrictive on the liberty right of contract.

Applying a standard of least restrictiveness, though, often involves a considerably more difficult judgment than this. Generally the issue is no longer simply whether the particular means a regulation uses is relevant to the harm and whether it imposes a greater burden than is necessary. The issue instead involves a comparison of how that means measures up to an alternative both in restrictiveness and in the ability to attain the same effective control of the harm. In addition, the alternative means may require certain conditions in order to be effective (or even to be politically acceptable) that may or may not exist—a cooperative rather than an adversarial climate, for example. Courts are understandably more reluctant to enter into these waters.

Consequently, many of the bitter disputes over liberty and regulation involve exactly this standard. Disagreement is not really about whether wrongful harm exists or even whether regulation is warranted. Instead, the battle is over whether less intrusive alternative regulatory approaches could attain the same result. As philosopher John Rawls puts the issue: "Regulations become unreasonable once considerably less restrictive and equally effective alternatives are both known and available."[25]

This question lies at the heart of debates today over a broad array of environmental and worker safety regulations, for example. In the environmental case, for instance, a main divide concerns the necessity of today's command and control regulations. Those regulations often specify the technology producers must use and spell out specific standards each producer must meet. Environmental pollution is a form of market failure.[26] The health, property, and accessory damage it causes ends up wrongfully harming other individuals, which creates the need for some form of regulation. But is the present approach overly restrictive? An alternative would combine pollution taxes and tradable permits for pollution that allow producers greater autonomy and flexibility to work out how to clean up emissions through market exchange. Many economists claim

that this regulatory alternative would control pollution just as effectively with less restrictiveness and at a more efficient cost than the present approach. Yet questions remain as to how high the taxes would need to be and whether the monitoring of emissions themselves (required to implement the taxes and permits) can be as effective as monitoring the devices to control pollution.[27]

A less restrictive or more efficient means is generally preferable as long as a compelling case exists that those alternate means would control harm as effectively as the chosen means—that they "possibly can" or "probably can" is not enough. Wrongful harm is a violation of individual liberty. If a compelling case cannot be advanced that an alternative approach projected to be less restrictive will attain similar control of the harm, the current regulation remains valid. However, the Court errs when it concludes, as it has with regulations dealing with the effects of pollution, that such regulations can be based on health considerations alone and need not consider the costs of the regulations as a factor at all.[28] The costs involved in regulation are surely not the only factor. But if an alternative means achieves the same reduction of harmful pollution with less restriction or cost, in a way that otherwise comports with freedom, and if compelling evidence exists that the alternative will attain this result, such means are preferable whenever freedom is the point of reference.

Many agencies in fact do apply some form of a least restrictiveness test. For example, the Federal Trade Commission often requires producers to supply information to purchasers if that will attain an outcome similar to one that more intrusive substantive regulation would; and, prior to intervention, antitrust policy generally considers not just monopoly power but the actual abuse of monopoly power.

The Court, as well, routinely uses a test of least restrictiveness with respect to actions that government takes in areas like the First and Fourth Amendment freedoms involving speech, conscience, organization, and search and seizure. Where it is comparing alternative regulatory approaches, the Court should do the same for economic and property rights found in the Constitution if evidence is clear and convincing that a less restrictive approach will in fact attain the same level of protection from wrongful harm.[29] True, requiring that there be a compelling case for the alternative makes it likely that implementing a least restrictiveness standard would overturn only a relatively small handful of regulations and replace them with others able to attain the *same* level of control of the harm. It nonetheless remains the appropriate standard in the reasoning of liberty. In addition, applying the standard provides the public with some as-

surance through review, otherwise unavailable today with respect to economic regulations, that those regulations are not obviously excessively burdensome or costly.[30]

Fair Apportionment of Costs

Apart from confining themselves to real harms and to means directly relevant to alleviating those harms in the least restrictive way, regulations to be reasonable ought also distribute their costs fairly. Both the harm itself and the direct and indirect costs of compliance must be fairly apportioned.

The area of negligence provides an illustration. A century ago, an individual could obtain no compensation for harm suffered if he or she contributed to that harm in any way, no matter how trivial the contribution. A rider breaking in a horse who was struck and seriously injured by an oncoming train whose warning guardrail failed to operate might well obtain no compensation if he himself stopped and looked but could not restrain his horse. The rules of contributory negligence protected the actions and behavior of defendants except under the most extreme of circumstances. They amounted to uneven rules in both principle and result.

Change away from this one-sided perspective began to appear first in federal legislation enacted during the early 1900s. Directed to the relations between railroad employers and workers hurt on the job, the legislation adopted the idea of comparative negligence. Generally, comparative negligence holds the plaintiff and the defendant responsible for their respective proportion of the fault and adjusts the plaintiff's losses accordingly. Since 1910, starting with Mississippi, all but four states have adopted comparative negligence rules, generally through legislative enactment.[31]

A similar trend occurred in the area of liability. In early America, "caveat emptor" described relations between producers and consumers. This principle emphasized the autonomy of action of the producer. It did so almost to the exclusion of considerations of harm that the producer's actions might cause the consumer.

As a result, beyond the decision to make the purchase itself, relationships between consumers and many producers were essentially one-sided in areas where "caveat-emptor ruled." Having experienced harm from a product, a consumer was free thereafter to shop elsewhere, but this freedom contained no remedy or compensation for the harm that had been done. It was not until the second decade of the twentieth century that major producers, selling their

products through independently owned outlets and dealers, as many do, could be held liable by consumers for physical or other harm that the producers' defective goods caused.[32]

Since then, we may appear to have traveled so far away from caveat emptor as to have gone to the opposite extreme. With the coming of strict liability, which holds the producer liable for harm regardless of intent or even negligence, the solution now may instead seem entirely one-sided in favor of the consumer. Strict liability is very different from caveat emptor, however. Unlike the principle of caveat emptor, whereby consumers shouldered the cost with no recourse, strict liability is expected to enable competitive market forces to distribute the costs of paying for liability widely between both producers and consumers.[33]

Just as the costs of the harmful effects of individual actions must be fairly apportioned, so must the compliance costs that regulations themselves impose. They must be equitably distributed, including indirect costs of the regulations inflicted upon third-party bystanders. Those considerations raise questions tested in the courts, for example, about the imposition of compliance costs on producers regardless of whether those producers contribute to the harm (for instance, regulations requiring all power companies to employ a mandated technology even if only producers burning a certain kind of coal emit excessive pollution). The same considerations, as well, would question the imposition of compliance costs on some but not all offenders even if all contribute similarly to the harm. They equally dispute the propriety of regulations imposing disproportionate burdens on certain bystanders or third parties—zoning regulations, for example, that place polluting and other hazardous industries solely in and around low-income neighborhoods.

Is Government Best That Governs Least?

Regulations are very big business in this country. The direct and indirect compliance costs that regulations at all three levels of government impose, both civil and criminal, likely surpass $1 trillion each year.[34] That is a far cry from minimal government, which we so often hear liberty requires. Yet under the morality of individual liberty, it is never appropriate for any private individual, company, group, or institution to inflict wrongful harm on another—harm that violates others' legitimate expectations of their own autonomy and that reaches beyond the reasonable risks we are all presumed to take and the burden of due

diligence we are all expected to bear. Those are obligations that liberty places upon all of us. As a result, when it comes to addressing wrongful harms that individuals inflict upon one another, a strong and assertive government comports with individual liberty in an almost straightforward, obvious way—affirmative government in the form of strong laws prohibiting murder, rape, theft, burglary, or fraud, for example, is generally seen as protecting liberty, not violating or reducing it. We all understand that our freedom stops where wrongful harm begins.

The obligations we have under individual liberty to respect one another's autonomy and refrain from wrongful harm are complicated, however. The morality of individual liberty inevitably raises endless questions about the line that divides rightful individual autonomy from the concomitant right of individuals to security from wrongful harm imposed by another. The obligations here are not simply many faceted or just highly nuanced. What is more, they are not usually subject to one single correct definition. As a result, they must be given definition. Only the collective society, ultimately, can provide that definition, which necessarily bestows enormous power upon government and its political and jurisprudential agencies.

From the vantage point of individual liberty, this observation renders the maxim that equates liberty with small government literally nonsensical. That is almost self-evident with regard to criminal laws, yet it applies no less to economic and social regulations. Say, even, that government decides to define individual autonomy and wrongful harm in a manner such as to confine and limit its own intervention. It has done this, to just give a very simple example, in deciding not to prohibit the sale of tobacco or tobacco products to consenting adults. In this decision of *nonintervention,* though, government still has exercised a very real power in our lives. One need only ask a sample of nonsmokers for their views, whether about their experiences within the families of smokers or within places of public gathering. As those experiences suggest as well, when government refrains from enacting nonsmoking regulations in public buildings and restaurants, it has again exercised a very real power in our lives. The same conclusion holds for virtually any area of economic and social regulation, for example, consumer product safety and control of pollution.

In dealing with issues about wrongful harm, that is, government is governing and thus exercising power and playing a highly active role in our lives *whether it regulates or not.* The very decision as to whether a particular harm is wrongful and requires intervention renders government active and powerful in

our lives, power it cannot avoid even if its decision is to refrain from intervening and to do nothing. And there will necessarily be numerous areas where the government does decide that wrongful harm meriting intervention exists because of a reasonable belief that the incentives of the free market, even coupled with awards through the jurisprudential process, cannot address the harm in a manner that comports with the morality of individual liberty.

Reasonableness standards have the purpose of addressing questions about excessive action by government. The standards stipulate that laws and regulations must direct themselves to a real harm that is wrongful, must contain means reasonably related to controlling that harm, must use the least restrictive means able to attain the same level of control of that harm, and must distribute costs fairly and equitably. In setting forth these imperatives, the standards are calling for restrained government and not small or passive government. Government cannot be small or passive because only the public sphere—the political and judicial processes of government and our collective life as a nation—can give definition to the obligations and then determine how the obligations apply to particular situations. Those are vast powers, as we have seen, whether government does or does not intervene affirmatively. No matter what its decision, government under freedom cannot escape playing a pivotal role in our lives.

Is there a better way to control and limit government? Does another set of standards exist that is able to deal with the issues at hand in a way involving lesser political latitude and bringing government under firmer control than the reasonableness standards? There are popular alternatives such as cost-benefit analyses and tests of cost-effectiveness. However, it turns out that those alternatives fail to narrow the latitude given to political decisions by very much, if at all, since what are benefits and costs and how to value them are quintessential political questions by their very nature. What is more, at important points those alternatives collapse, calling for the reasonableness standards and the obligations they entail, because the alternatives themselves come into direct conflict with the moral principles of liberty.

CHAPTER SIX

Overcoming Market Failures

The presidency still remained a glimmer in Abraham Lincoln's eye when, in 1854, he set forth his own idea of a proper government for a free people. "The legitimate object of government," he wrote, "is to do for a community of people whatever they need to have done, but cannot do at all, or cannot so well do for themselves in their separate and individual capacities. In all that individuals can individually do as well for themselves, government ought not to intervene."[1] Lincoln's definition came two years before the birth of the Republican Party he helped create. The definition nicely describes the roles that government plays in honoring the obligations under liberty in the areas of economic opportunity and wrongful harm. In addition, it brings to light another fundamental area of life in which all of us have shared commitments to one another as free individuals—a very different area in which freedom sees us as part of a larger whole and asks us to refrain from acting simply as autonomous individuals.

The free market operates on the principle that we each do our own thing in the attempt to advance our separate personal ends. There are instances, though, in which individuals acting separately will necessarily fail to produce the successful result those same individuals want. Only by acting as a single cohesive

unit can the result occur that the individuals desire. The inability to achieve individually and separately what we can if we work together, as a unit, is sometimes called a "market failure," because voluntary action and free exchange fail. Thus does Nobel economist Milton Friedman advocate collective action that enables us "to accomplish jointly what we would find it more difficult or expensive to accomplish severally."[2] Responding to these market failures, we will see, ends up reconnecting us with the most cherished principles of our individual freedom.

Public or Collective Goods

What kinds of matters are these, though, in which individuals can accomplish what they desire only by acting in concert as a single unit but cannot if they try to act and collaborate together as separate individuals? What can we achieve solely through unified collective action that we can't working together severally? Quite a lot, it turns out.

National defense is the most obvious example,[3] and not simply because virtually everybody wants the nation to be able to defend itself at some level, despite our different ideas about what this may require. Without effective national defense, of course, the country and the lives and liberties of the citizens within it would become vulnerable to successful foreign invasion and takeover. So it is reasonable to presume that all Americans will benefit from such protection notwithstanding the disagreements we have over how much of it the nation needs and in precisely what situations we need it.

All of us also want and will benefit from quite a few other things, too, like food and housing and clothing. Unlike with such other goods, however, a characteristic of national security is that it is inherently collective. By inherently collective, I mean that it is not possible to supply national defense in a manner that protects only those who pay to receive it and omits protecting those who have not paid. Any entity successfully defending the nation's borders from foreign invasion must simultaneously protect every person residing within those borders. Thus, if an enterprise provides national defense, individuals will benefit from that defense even if they have not paid for it, and so those individuals have no economic motivation to pay unless they must do so.

Goods of this kind are sometimes called public or collective goods. These are goods that, once they are produced, anyone and everyone can use or consume without regard to whether they paid for them or not. It is in the very nature of

the good that, once produced, no one can be denied. When it comes to such goods, each of us can be a "free rider." Because every individual can get the good for free, private producers have no economic incentive to produce the good unless enforced collective action, generally through taxation, will assure payment for it. A private or free market, in which we all act as separate individuals, is thus likely to fail.[4]

New knowledge transmitted through published basic research represents a similar example of a public good. Published knowledge becomes freely available to all. If basic research is available to everyone to use freely, the originator of the research cannot control its use and capture its full value. Consequently, a free market will not produce basic research at an optimal level even though such research is indispensable for innovation and growth in the economy.[5] For that reason, a considerable amount of basic research relies upon public funding. Many of the nation's most competitive and prosperous industries, from computers to laser technology and from jet air transport to satellite communications, have depended significantly upon publicly funded research.[6] A fair portion of this funding has been connected to defense and to areas otherwise relevant to national security, such as space exploration. Public expenditures for national defense and for basic research, taken together, came to about $380 billion in 2000.[7]

Natural Monopolies

If collective goods produced through a free market become available to all for free, another kind of good has almost the opposite characteristic. The prices charged for these goods, when produced through a free market, will greatly exceed the costs necessary to produce them. Many goods in this category serve a basic need that individuals cannot easily choose to defer or delay—for example, water and other utilities.

Imagine having dozens of water lines in competition with one another. Given the high fixed costs, none of the water lines can be profitable as long as the demand is divided up, unless each provider charges much higher prices to supply, operate, and maintain water lines than would a single enterprise with a single set of water lines. Either a private competitive market will charge significantly higher prices than needed to supply the product, or the market will settle down into the provision of water lines through a single enterprise or through a very few competitors. In this case, though, a genuinely competitive market will

no longer exist. Were this to happen, a producer would gain a monopolistic or oligopolistic position leaving little or no choice to consumers, a result inimical to freedom, and would be able, once more, to charge high prices. The problem for freedom involved in the absence of choice is magnified, of course, when it concerns goods serving a basic need that individuals cannot easily opt to defer or delay, such as is so with water.

A natural monopoly occurs when a single firm is able to produce a good at a lower price than firms that are in competition with one another. Arising out of the normal operation of a private market, natural monopolies often involve areas of activity in which the fixed costs of producing a good are so substantial before the good can be supplied that competition among different producers, each dividing up the market yet also having to pay those substantial fixed costs, will actually increase the price of the good rather than lower the price. The only way to avoid exorbitant prices is for the number of competitors in the market to decline to a very few producers or to one producer alone.

To deal with the absence of true competition and choice, it is possible to own and operate water lines collectively or to put them in private hands and, because they are natural monopolies, place them under careful collective regulation of some kind. As with public goods, there is no way to get around the need for working together as a collective whole either to produce or to carefully regulate the production and pricing of these goods. Nor do natural monopolies exist in just a few places off on the outer borders of the economy. Areas other than water lines that have characteristics of natural monopolies or near natural monopolies are sewage systems; various types of utility lines (gas and electric, for example); fire service; roads, highways, and bridges; public transportation routes and railroad beds; the post office for first-class mail; airports and water terminals in most localities; and space exploration through much of its history.[8] Taking into account building, operations, and maintenance involved in those areas, the combined spending of federal, state, and local governments in 2000 totaled about $370 billion in all the areas together.[9]

Some of the natural monopolies, like water and sewage, may seem rather mundane, perhaps trivial in the scheme of things. The public sector expends around $60 billion annually to operate and maintain water and sewage systems, less than one-fifth of the total it spends on natural monopolies, and about 2 percent of all governmental spending. Yet the development of public water and sewage systems has had an impact on prolonging the life span of individuals that rivals the effect of any other innovation in the past century. (Many of

the others, like penicillin and antipolio vaccine, themselves arose partly out of public-sector funding or purchasing, as I describe later in this chapter.) Over the past one hundred years or so, the life span of the average American has increased by about twenty-five years, fully 50 percent. Even seemingly marginal actions can have immense effects.

Averting Recessions and Depressions

Imagine living in an economy that operates like a gigantic roller coaster, in which deep recessions and depressions occur every few years, causing businesses to collapse all across the economy and throwing millions of workers out of jobs for prolonged periods, followed by several giddy years of soaring growth accompanied by rising inflation. That fairly describes how our economy once worked.

A free market has difficulty maintaining its own stability because, it turns out, many everyday actions that are perfectly rational for individuals to take as individuals can become cumulatively destructive and end up damaging the interests and welfare of all those same individuals. An underlying assumption of the free market is that through voluntary exchange individuals can act efficaciously on behalf of their own distinct ends. Because of the so-called invisible hand, each individual doing so will produce a positive exchange for both that individual and the collective whole. This underlying premise is violated in the case of individual behavior whose unintended cumulative impact becomes destructive for the individuals themselves as well as for the collectivity.

Suppose businesses project that hard times are coming. Acting on those perceptions and their own rational ends, the businesses are individually likely to reduce investment, production, and employment because they anticipate that the market for future sales will be lower. On their part, individual consumers who believe that hard times may be coming are likely to prepare for those times by borrowing less and saving more.

Monique Davis of Sanford, Florida, used exactly this thinking in 2002 when times were sluggish and layoffs growing: "I have a good job," she said, "but I don't know if I will tomorrow so I'm trying to save money."[10] As individual businesses spend less on investment as well as employment and individual consumers spend less by reducing borrowing and saving more, the whole economy is likely to slow. In response, it then becomes in the interest of individual businesses to invest, produce, and employ still less and for individual consumers

to borrow less and save even more, if they can. This collective spiral, arising from individuals each acting rationally and reasonably on behalf of their own ends, is likely to result in ever slower economic growth.[11] As Adam Smith recognized early on, the process eventually descends into recession (or, worse, depression), reducing nearly everyone's income and choices and producing bad results for almost every one.[12] It becomes something of a self-fulfilling prophecy, that is, unless some countervailing force intervenes. The reverse collective dynamic occurs when businesses and individual consumers believe economic times are getting better, leading ultimately to increased demand that threatens to ignite inflation, again unless some outside force intervenes. The free market itself contains no internal mechanism able, on its own, to avert these destructive spirals.

As a consequence, it is generally agreed that something external to the economy must provide a countervailing, or countercyclical, force in some form in order for the economy to be able to gain stability.[13] Different points of view exist as to the best way for government to intervene as an external force—whether, for example, government should do so through adjustment of the money supply and the rate of interest on money or through its own spending and taxing.

Either way, though, the amount of collective action we are likely to need to take to maintain the economy's stability is pretty substantial. When the private economy slows, government can bolster demand by increasing public spending relative to taxation (resulting in larger budget deficits) and then doing the reverse when private spending begins to expand and the economy shows signs of heating up. Just consider the federal government's budget deficit over the course of the last full recovery. In the first entire year of recovery after recession, in 1992, and then the seventh year of the recovery, in 1998, the difference in net spending and revenues came to $350 billion (a deficit of $281 billion in 1992, compared with a surplus of $73 billion in 1998), a tidy sum.[14]

An alternative approach, one able to be undertaken either simultaneously or separately, is for the government to use its power through the Federal Reserve to manage interest rates. The idea here is for government to lower interest rates when the economy slows down, thereby increasing private spending by making it cheaper and easier to borrow money for investment and consumption. Conversely, when the economy threatens to heat up excessively, the idea is for government to raise interest rates so as to reduce private spending.

That there have been only two years of recession since 1982, both very mild

downturns, suggests that the government has learned well. The situation since 1982 contrasts greatly with the nation's experience until well into the twentieth century, prior to the development and practice of countercyclical policy. Deep recessions and depressions, with devastating effects across much of the population, were the rule then every handful of years. To quote Friedman again, government has "enable[d] us to accomplish jointly what we would find it more difficult or expensive to accomplish severally."

A common—and commonsensical—belief holds that government should live on a balanced budget. Any individual family and business must do that. The government ought to have to as well, in this view. Following this understandable precept, the federal government would tighten its belt during hard times no differently than individual Americans and their families would. Most state and local governments are under constitutional mandates to do so. The consequence of all this belt tightening, though, reinforces the very conditions causing families, businesses, and state and local governments to have to reduce their personal budgets in the first place. For this reason, even many advocates of amendments to the federal Constitution to balance the federal budget acknowledge the need for exceptions during times when the economy is in contraction.

The free market, of course, is not itself easily separable from government. To the contrary, it is an act of government. The free market depends for its own continuation upon public policies that both create and then protect its very foundations. Without laws establishing and enforcing the validity of contracts, rights of property, patents, rules about competition, and the like, a free market would fare poorly and likely come apart. As the columnist George Will observed: "A mature capitalist economy is a government project. A properly functioning free market system does not spring spontaneously from society's soil as dandelions from suburban lawns."[15]

Innovation in the Economy

Furnishing conditions that help stabilize the free market is one thing. Our action together, collectively, may be required in that effort, for the reasons mentioned, but at the same time it describes a proper limit, doesn't it? Creating the prosperity that we all enjoy is something else, many Americans believe, a result that the free market can accomplish on its own, indeed better on its own. The intrusion of government only hinders the process and slows it up. We are

used to thinking of innovation and prosperity in the economy as children born of the competitive energies and continuous quest for profit that are the hallmarks of private enterprise.

That belief contains much truth. That the dynamics of free exchange contribute very powerfully to prosperity is beyond doubt. Yet the free market has limitations even in its ability to deliver innovation and growth. I have already referred to the free market's need for public support when it comes to collective goods like basic research. A number of products familiar to us all, like Teflon, Gatorade, Crest toothpaste, and the microwave oven, came directly or indirectly out of publicly funded research and institutions. In fields ranging from metals to oil, chemicals to instruments, and information processing to pharmaceutical drugs, approximately one-fifth of the new products coming onto the market rely significantly upon recent academic basic research,[16] much of it publicly funded. The economic returns from this publicly funded research, both to the society at large and in revenues that flow back to the government, are substantial.[17]

Those new products just skim the top of the surface, though. The government's contribution to economic innovation penetrates far more deeply, down to the economy's very core, whenever basic research intersects with still another kind of market failure that we might call "thin markets." A thin market exists when there are few ready consumers for an innovative undertaking in the private market and the costs of research, development, and initial production of that undertaking are very high. This combination—few ready consumers in the market and very high front-end costs—is not a promising one to private investors, with the result that innovations combining such characteristics have only limited chances of being created and taking hold within an unassisted free market.

If there are few consumers, one understandably wonders why we would want the production of such goods in the first place. Yet frequently we do. Often, the number of ready consumers is small because few, if any, consumers can afford the product unless it becomes very much cheaper or because the producers and consumers don't yet understand the range of commercial applications that the product actually has. In such cases, government acting as an initial consumer of the good as well as funder of research and development can serve to bridge the gap.

The American computer and data processing industries illustrate the point. Those industries now employ more than 2 million workers, many of them in

highly paid jobs. The initial development and growth of these industries in the United States, enabling them to become among the nation's largest and most prosperous, took place primarily because of the government's interest in computer technology for purposes of defense and, later, space exploration. Not only did the federal government finance much of the exploratory research into the first electronic computers, but it "was practically the sole market for the early operational computers. . . . Few of the companies involved in the early work for government believed that there would be a large civilian as well as a government market. Of course later a very large nongovernmental market for computers developed. The massive government support to computer technology provided U.S. companies with a head start that still has not been surpassed by foreign companies."[18] Similarly, work on the miniaturization of electrical circuits that resulted in integrated circuits and semiconductors, though not financed by the government, "was undertaken with the clear understanding that, if it were successful, there would be a massive government market."[19] The nation's computer and semiconductor industries were unintended spin-offs from governmental programs aimed elsewhere, largely at defense and space exploration involved with national security.

Numerous economic innovations have histories that share broad similarities with the development of the computer and semiconductor industries, in which government was a vital contributor of the funds for initial research and development or provided an assured substantial market through its procurement, or both. Along with computers and semiconductors, they include the development and basic design of commercial jet aircraft, satellite communication, nuclear energy, penicillin and antipolio vaccine, laser technology, innovations in microbiology based upon RNA and DNA, and the Internet (both the Internet itself and much of its basic software, including the first Web browser and the first search engine).[20] Taken together, those industries and goods now account for many hundreds of billions of dollars in annual output. It's hard to imagine our economy today without those industries, or with them at a vastly reduced scale.

Carrying out its own functions, government never intended to contribute toward generating a long line of large, highly prosperous industries. The activities almost always had other aims of government that are appropriate under liberty, most often national security or functions such as education, public health, and support for basic research. But the creation and substantial expansion of various industries and products were nonetheless the result. The conse-

quence is that a good part of the underlying character of today's American economy has arisen out of an essentially complementary relationship between the public and the private sectors rather than solely from the operations of the private sector, let alone a private sector having to overcome the dead weight of government. Our economy's progress does not simply grow out of what we do individually as producers or consumers. Our ability to prosper also depends very much upon what we do together, collectively, as a society.

The Nation's Largest Industry

An essential condition for individuals to be free concerns the veracity of information that is available to them. Individuals who have to make decisions based upon information that is intentionally false or biased are not truly free in a mutual exchange when they have no reasonable avenue to obtain objective information. Situations of great information asymmetry in a private market, especially regarding areas of essential need, thus become a crucial problem. A private market cannot operate properly—or as theoretically intended—if one side to an exchange (say, the producer) is well informed and the other side (say, the consumer) is uninformed and misled concerning a good or service, when the consumer has no practical way of becoming well informed except through the producer.

Consider the nation's largest industry, health care, and the information asymmetry that exists between physicians and their patients. Patients depend upon their doctors to inform them about the condition of their health and their needs for medical services. At the same time, doctors' own livelihoods are often improved by rendering more services. If that is so, they then have an economic incentive to use their informational advantage to supply more services. This incentive continues to operate even for second opinions. Unless other countervailing pressures are introduced to restrain health care providers (such as through HMOs, whose many restrictions on health services and consequent bureaucratic expense contain their own set of problems), one can expect an oversupply of medical services by doctors and hospitals to take place and an overconsumption of these services by patients who have prepaid for health care through insurance. Together, they will result in increasingly large and not necessarily beneficial levels of expenditures for health care.

The possibility of costly oversupply and overconsumption is just one type of market failure that the area of health care must confront. Another market fail-

ure that profoundly affects health care is adverse selection. It results in substantial underconsumption relative to need. Because of the high cost that medical care can involve, individuals generally must finance their health care in whole or in part through insurance. However, providers of insurance have an economic incentive not to insure a universal pool of individuals—a pool that includes both the healthy and the unhealthy. Instead, health insurance companies are economically rational to attempt to insure only those individuals who are healthy and statistically likely to remain healthy. Likewise, they are rational to try to select out those individuals who either are already unhealthy or are statistically likely to become unhealthy. The more that insurance providers select out unhealthy individuals and individuals statistically projected to become unhealthy, the more expensive and unaffordable it becomes for those individuals to obtain insurance. The private market does not make insurance available to them based upon average risks as it could have done were it to have insured a universal pool of people. The propensity of private insurance to exclude unhealthy individuals became a main objection to the reform of Medicare that added prescription drugs and allowed private insurance to compete with Medicare for a trial period. The objection was that insurance companies would take the healthiest insurees at lowest cost and leave the most expensive cases to Medicare, leading Medicare to have to charge higher overall prices that would become uncompetitive.

Target groups of individuals considered as potentially unhealthy and ripest for adverse selection, unless the government provides support, are the elderly, the poor, and individuals with prior health conditions. For health care insurance to be made available to those individuals, external regulation must require that insurance companies cover them at generally available prices (which federal and state governmental regulations have increasingly done for individuals who have prior health conditions), or health insurance must be heavily subsidized, or health care must be delivered outside the private market. Federal and state governments have undertaken to combine the latter two alternatives for the elderly and the very poor, largely through Medicare and Medicaid. Those programs expend about $430 billion annually, with another $110 billion in outlays through local hospitals.[21] The programs align with the market failures that have just been described, although they gain ample vindication as well from the reasons set forth in Chapters 2–4 that justify assuring adequate basic economic opportunity for all.[22]

That both the supply and consumption of health care in a free market are

subject to serious market failures raises the possibility that universal collective action we take together can succeed more effectively and efficiently—perhaps for everyone—than what the competitive private market is able to provide. The National Health Service in Great Britain furnishes health care for Britons at about *two-fifths* the cost per individual expended on health care in the United States, and at about one-half the cost as a proportion of the GNP.[23] This amounts to a cost difference of from $2,500 to $3,000 a year per American, or $7,500 to $9,000 a year for a three-person family when all costs are considered.[24] For most families that represents a substantial increased expense. A significant part of the difference results from the sheer bureaucracy required in a private system to carry out oversight and billing for coverage. The difference in bureaucratic expenditures alone between the American and British systems comes to about $3,000 a year per average American household.[25]

Moreover, health outcomes in the United States are generally no better than in Great Britain.[26] The British National Health Service delivers a level of health care equivalent to the care average Americans receive in an average HMO, and with as much choice of physicians and promptness. The notorious waiting lists in Great Britain are replicated in the American system, and then some, through preexisting and other conditions that HMO policies do not cover and the long waiting times HMO patients often experience getting appointments to see specialists. Researchers found from one survey that five hundred thousand Californians in a single year had been *denied* care by their health plans for their conditions.[27] This is not to mention the tens of millions of Americans, most of them employed and working, who are not covered by health insurance plans at all and have no access to care save for emergency facilities. Those Americans cannot even get in line.

Although Great Britain delivers health coverage comparable to that provided by an average HMO for around $8,000 less annually per household, some Americans do receive higher-quality care through full indemnity insurance than either the average Briton receives through the National Health Service or the average American through the typical HMO.

Yet a savings of $8,000 annually for an average three-person family is a lot of money. Assume that coverage under some universal health insurance mechanism for Americans were to produce a savings on present health care spending that, say, is only *half* the present cost difference between the United States and Great Britain. Half of that cost difference amounts to about $4,000 per year for a three-person household, largely accounted for by the added bureaucratic, emer-

gency care, and oversupply costs connected to the succession of market failures embedded in our mostly private system. Were the majority of savings directed back to individual households, families would end up having far better choices than are currently available to them. Some of those households might choose to use the additional money that a universal system would leave them by spending it on other goods and services, or maybe they would save it. Other families would choose to put part or all of that money back into their health care. In their cases, the freed-up money would enable them to purchase secondary private insurance. That insurance would be able to make up the difference in quality, choice, timeliness, and convenience between a universal system at the level of today's typical HMO and full indemnity insurance. The latter is the *best* insurance currently available in the American system.[28]

If that outcome resulted, not only would a system of universal care with the option of secondary private insurance then cover everyone—including the 40 million Americans who are now uninsured—but, equally important, each and every health care consumer currently covered by insurance would either become better off than or left the same as under the present system.[29] No health care consumer need become worse off or have less choice. The outcome expands choice for most consumers (universal HMO-like coverage plus the option of indemnity insurance), with no loss of quality, promptness, or choice for virtually any consumer (since indemnity insurance remains an equally affordable choice for all who have it now). In the case of consumers, then, if none are made worse off, universal coverage with the option of supplemental private insurance is fully compatible with the protection and advancement of individual liberty. Although the average income that doctors receive need not necessarily change, it is true that more physicians would likely come under some form of salary rather than strictly fee-for-service practice (the same is now increasingly happening, already, in some sections of the country). And private insurance companies would take a secondary place to universal coverage, rather than continuing their present primary position, perhaps requiring some compensation to them.

We can see here the possibility of attaining a considerable improvement for many American families in a manner that comports with the Lockean proviso that no individual become better off by harming others and making them worse off. Economists sometimes call this kind of outcome "Pareto efficient." Pareto efficiency describes situations in which change improves conditions for some or many individuals while at the same time leaving no individual worse

off. Such an occurrence is potentially achievable through universal health coverage with the option of supplemental private insurance. That kind of outcome would render substantially greater public intervention into the private market to create a universal system congruent with individual liberty and the reasoning that makes it morally defensible.

Today, universal health insurance lies very much at the margins of public discussion. Is that deserved? Marcia Angell, former editor in chief of the *New England Journal of Medicine,* has this to say: "Many people believe a single-payer [universal] system is a good idea, but that we can't afford it. The truth is we can no longer afford not to have such a system. We now spend more than $5,000 a year on health care for each American—more than twice the average of other advanced countries. But nearly half that amount is wasted."[30] Not only does the collective approach surpass the competition and voluntary exchange of the free market in providing access to health care for all individuals who otherwise would be selected out and thereby effectively deprived of the opportunity for coverage. More than that, it has the possibility of surmounting the many other market failures in health care and the waste and inefficiencies they create, today causing individual Americans and their families to have to pay out hundreds of billions of dollars more per year for little or no return in better care.

Liberty

Broadly speaking, we can think in terms of two sets of market failures: those that it is reasonable to anticipate may create an actual diminution or loss of individual liberty, and those that bear some other connection to individual liberty. Inadequate national security may result ultimately in successful foreign invasion and an actual loss of freedom for many or all Americans. Failure to deal with natural monopolies may force individuals to have to rely and become dependent upon a single producer to fill a basic necessity, again inimical to individual liberty. It is true that the competitive free market cannot efficiently supply a good like national security or those goods that give rise to natural monopolies. Yet it is the loss of individual liberty inherent in those market failures and the coerciveness they can be expected to involve, not only the free market's inefficiency, that summons governmental action and intervention in these areas.

The second kind of market failure we've discussed has to do with the economy's stability, its capacity to innovate, and the economics of health care.

Those market failures qua market failures (as opposed to concerns they raise about adequate economic opportunity) have little to do with a potential reduction of individual freedom through coercion. Instead, they involve areas in which it is reasonable to believe that many individuals can be made better off through collective action than would otherwise occur, with a greater range of choices available to them, and virtually no person would be made worse off with lesser choice beyond the reasonable level of risk we all assume.[31] That is, they all involve improving individuals' relative conditions and range of choices without worsening those for other individuals. This reasoning bears a strong resemblance to the calculus behind the Lockean proviso.

For example, using countercyclical policies to avert or soften economic recessions and depressions and maintain the economy's stability affects almost all individuals in a manner that prevents them from faring as badly as they otherwise would fare. It is relevant as well that many of the increased expenditures involved in attacking this market failure simultaneously serve commitments that government has for other purposes directly tied to individual liberty, such as those connected with addressing issues of economic opportunity. The same is true for the role of government in innovation. As we have seen, a good part of the spending that ends up generating innovations, including much basic research, relates to activities the government engages in for other reasons having to do with individual liberty—national security, in particular. Most governmental expenditures going toward market failures of the second type share this same characteristic—they are directed simultaneously to other proper aims of freedom.

When spending toward the second type of market failure does not have that characteristic, however, it must satisfy the requirement of the morality of individual liberty that no individual be left worse off with less choice. This requirement means that the benefits to each individual from those activities must at least equal the costs that those activities impose on the same individual beyond reasonable risks we are all presumed to take. For the reasons mentioned earlier, countercyclical policies would appear to meet this test. It is plausible that governmental expenditures on basic scientific research for its own sake also meet the standard. The innovations and income growth resulting from that basic research have not simply contributed to the lives of many Americans; they have added significantly to the government's own revenues, possibly more than enough to defray the original costs of the research by themselves.

Examined within the context of health care, the precept that no individual

be made worse off suggests something further—it points to conditions under which the morality of individual liberty summons significantly greater action through government than currently occurs. Given the many market failures involved in health care, attempting to operate this sector using competitive free-market forces is like trying to fit a square peg into a round hole. Rounding the peg through universal public insurance has a potential to provide large numbers of Americans with substantially better health care coverage and choice than they have now at the same cost or with the same coverage they have now at considerably lower cost. It can accomplish this end, plausibly, without reducing the coverage, or increasing the cost, for any individual. If it does these things, universal coverage follows the moral principles of liberty. By contrast, the patchwork system we have now based on the free market, which leaves out millions of working Americans along with millions more who lack coverage for preconditions or other reasons and is far more costly than collective alternatives, does not.

"The legitimate object of government," Lincoln said, "is to do for a community of people whatever they need to have done, but cannot do at all, or cannot so well do for themselves in their separate and individual capacities." In part, Lincoln describes what many modern economists later came to define as market failures. Such failures are more numerous and require collective action on a much larger scale than we usually appreciate. Each of the market failures that we've examined either raises issues directly involving coercion or operates within the principle of the Lockean proviso.[32] From the moral reasoning of liberty, those characteristics define matters that fall within legitimate functions of government. Addressing them entails a wide array of societal interventions, consuming about $750 billion annually in governmental expenditures.[33] What is more, effective resolution of the massive market failures beleaguering the health care industry has yet to take place. When it finally does, the role for acting together as a society through the public sphere, following the reasoning of individual liberty, is likely to grow still larger—dramatically larger—than it has been to date.

CHAPTER SEVEN

The Size and Waste of Government

In order to be moral within its own process of reasoning, and thus be genuine, individual freedom calls for sharing a robust collective life and making collective political decisions reaching far beyond the minimalist state that free-market adherents advance. Honoring the moral obligations of liberty leaves the collective society having to grapple with a great range of public issues across the areas of adequate economic opportunity, wrongful harm, and market failures. The expenses involved in addressing the issues are enormous—indeed, they account for nearly all government spending in the United States, more than 90 percent, as the prior chapters have shown.[1] Amounting to $30,000 per household, over $3 trillion per year, that spending fits any definition of massive government.

We are presented here with an apparent contradiction. That the reasoning of liberty demands substantial collective societal action and a sizable public sphere means that resolving to keep government small and honoring the obligations we have toward one another under freedom stand in conflict with each other. Recall that many of the Framers found themselves caught in the very same contradiction. They spoke often and fervently of small government in

relation to liberty. Yet they created a more powerful federal government out of the weaker confederal system precisely, as they stated in the Constitution's Preamble, to "secure the blessings of liberty for ourselves and our posterity."

Is there a resolution to this age-old contradiction? What must commonly held beliefs—such as "freedom requires small government" or "less government and lower taxation result in more freedom"—mean for them to be valid within the reasoning of freedom? If "small government" cannot mean small in size or a government that remains on the margins, what else might it mean? Several possibilities suggest themselves. First, a government that is small in the reasoning of individual liberty might mean a government that confines itself strictly to addressing issues of individual liberty—a government that avoids straying into areas extraneous to freedom. Second, it might mean a government that is and stays affordable to its citizenry. Third, and finally, it might be a government that uses the least restrictive or coercive means consistent with effectively resolving issues of individual liberty.

Each of those possibilities involves a way of restraining government. Restraint is the key. What the moral reasoning of liberty is calling for is government that remains restrained and disciplined rather than one that is small in size. Government should carefully limit itself to taking up issues connected to individual liberty and not enter into unrelated areas. It should stay within the financial means of the citizenry. And, while keeping its focus confined to questions of liberty, it should use the least restrictive or coercive measures possible that will attain the required ends. The least coercive measures include keeping wasteful spending firmly in check. One can see how all those restraints tie in with the idea of liberty. Each of them also represents a meaningful limit on government. In addition, at least in principle, all of them are compatible with honoring the other obligations we have to one other in order for liberty to be genuine.

Precisely because of the need to honor those obligations, some of which may be costly, the size or magnitude of government is not and cannot be the heart of the issue if individual liberty is the aim. As sure as anything, no one can fairly describe government in the United States as little in size or as off on the margins. But how well does it measure up to the three imperatives for restraint and discipline to which I have just referred—imperatives that identify the proper scale of the nation's government and collective political life within the thinking of individual liberty.

Restraint in Government

Confinement to Issues Involving Individual Liberty

The bill for addressing issues of liberty concerned with adequate economic opportunity, wrongful harm, and market failures came to about $3.06 trillion in 2000.[2] Earlier chapters describe the various expenditures, the kinds of programs they funded, and the way they apply to liberty. Taken together, they account for nearly 95 percent of the total of $3.24 trillion spent by government in the United States at every level. This is to say that extraneous spending by government outside areas involving individual liberty is by far the exception rather than the rule.[3] In recent history, all sorts of areas foreign to individual liberty, even opposed to it, have occupied the governments of democratic nations elsewhere, but this has not been the case in our nation, or at least not nearly to the same degree. Here are a few examples: state-sanctioned and -funded religions; nationalization of a wide array of industries and natural resources unrelated to issues of individual liberty; sweeping industrial policies to plan and direct activities within the economy; and cradle-to-grave social policies that grant considerable income support to all individuals and families without regard to either employment or the ability to gain employment. In many nations elsewhere, the expenditures consumed in policies like these over the past century have been substantial, many orders of magnitude greater than here.

A popular theory, sometimes called rational or public choice theory, posits that democratically elected governments have an inherent tendency to expand and grow, a tendency that has little to do with addressing issues of freedom. In a democracy, according to this theory, voters, elected officials, and bureaucrats are usually motivated to pursue their own self-interests. Politicians advance their goals for reelection and bureaucrats their careers and agency budgets by catering to active special interests that are politically much better organized than—and often opposed to—the interests of the general public. Like a vicious circle, self-serving politicians win elections by enacting programs that benefit self-interested organized segments of the public. At the same time, bureaucrats enhance their own careers and expand their agencies by advancing programs that benefit the same kinds of interests. In the end, the internal dynamics of elective government and administration, in a world of self-seeking people, operate to expand the size and reach of government. Over time, government

Table 7.1. Total Governmental Expenditures as a Percentage of the GDP, 1960–2000 (in billions of dollars)

Year	GDP	Governmental Expenditures	Percentage Of GDP
1960	527	2,151	28.7
2000	9,825	3,240	33.0

grows ever larger, indiscriminately so. As the public sector becomes disproportionately larger, the private sector in turn becomes proportionately smaller. So commonplace is this perspective in research coming from rational and public choice scholars that a leading review of the findings of that scholarship relevant to the American experience carries the title "Why Does Government's Share of National Income Grow?"[4]

I mention this view not simply because many social scientists hold it. Just as important, it reflects a widely held belief about politics and government both in the news media and among the general public. As Representative Sue Myrick of North Carolina described government, reflecting how many Americans think: "This place is set up to spend money; you know it's just the nature of the beast."[5]

Government that is prone to grow indiscriminately irrespective of issues connected to freedom, growth more rapid than the rest of the economy and often counter to the desires of a majority of the public, does not seem particularly well suited to the principles of individual liberty. And it is true that government in the United States has expanded out of proportion to the economy over the past two generations, as the figures in table 7.1 show. Viewed as a proportion, the public sector expanded from 28.7 percent of the economy in 1960 to 33 percent in 2000. That's an appreciable increase, seemingly confirming the belief that many scholars, journalists, and citizens have.

A very different picture lies hidden beneath the figures in table 7.1, however. Government has a broad core of activities that it finances through general revenues. General revenues come from general revenue taxes (income, corporate, sales, and property taxes, for example) as well as charges for services. Embracing literally thousands of individual programs, the activities within this broad core cover, among other things, police and corrections; education; road building and maintenance; water, sewer, and other public services; means-tested social assistance programs; basic research; economic policy; international affairs; foreign aid; defense and national security; and payments on the

debt. That is, the broad core of general-revenue activities includes almost all government does except for the separately funded social insurance benefits (principally unemployment, Social Security, and Medicare) and public employee retirement programs. Those programs are primarily financed through their own regime of taxation and contributions. When expenditures for those separately financed programs are excluded, net overall spending for *all* remaining programs financed through general revenues—all the core programs at all levels of government combined—has changed very little relative to the size of the economy for a period spanning nearly forty years now, since the last year of Dwight Eisenhower's presidency (see table 7.2). The change over all these years has moved government from 25.1 percent to 24.7 percent of the GDP.

The figures in table 7.2 indicate that a substantial rise in the proportionate spending of government absent the social insurance and public employee retirement programs occurred only in one decade, from 1980 to 1990. Even very little of that increase came from any net expansion of governmental programs and activities. The growth arose instead from a substantial enlargement of budget deficits (the failure to raise sufficient general revenues) that led interest payments on the debt to rise from about $55 billion yearly to nearly $190 billion a year over the decade.[6] Absent the ballooning expenditures for interest on the debt, government spending in the general revenue areas as a proportion of the economy actually dropped slightly from 1980 to 1990.

Moreover, the social insurance areas, in which governmental spending did expand significantly, had nothing to do with attempts to appeal to organized minority special interests toward which a majority of the public was either indifferent or opposed. Social Security and Medicare constitute much of the increase. Those programs have been backed by sizable majorities of the public for many years. The programs are also funded through a visible, not hidden, system of taxation and payments. Most fundamentally, the programs address issues connected to the morality of individual liberty, not issues extraneous to individual liberty.

Although government has grown considerably in size, indiscriminate growth and growth unrelated to legitimate issues of individual liberty are an entirely different matter, as is growth opposed to the views of a popular majority. In terms of its net increase, government has shown no such tendency over the past forty years.

True, a number of programs outside Social Security, Medicare, and public employee retirement did increase considerably in expenditures over those

Table 7.2. Total Governmental Expenditures Excluding the Social Insurance and Retirement Programs as a Percentage of the GDP, 1960–2000 (in billions of dollars)

Year	GDP	Governmental Expenditures	Percentage Of GDP
1960	527	132	25.1
1970	1,040	266	25.6
1980	2,796	719	25.7
1990	5,803	1,610	27.7
2000	9,825	2,425	24.7

years. Within the broad core of general revenue spending, for example, expenditures for police protection and corrections rose significantly, as did Medicaid and low-wage subsidies through the Earned Income Tax Credit. At the same time, quite a few other programs within the broad core, both large and small, counterbalanced that growth with decreased spending in proportion to the economy. Expenditures on welfare lost ground, for example, as did those on defense and veterans affairs for much of the period and also those on both public service jobs and job training.[7]

What is true for the core activities as a whole also holds for the regulatory costs of the federal government. Whereas some regulatory areas expanded, the airlines, trucking, and telecommunications industries were wholly or partly deregulated, telephone's monopoly was ended, and quite a few regulatory agencies such as the Consumer Product Safety Commission and the National Highway Traffic Safety Administration experienced long stretches of declining real budgets and personnel. A number of studies decrying the growing burden of federal regulation since the early 1970s actually confirm, beneath the surface of the figures they report, that the costs of governmental regulation did not grow disproportionately. Rather, they stayed the same or declined relative to the GNP over the time periods these studies examined.[8]

Affordability

All the same, as we observed, the total expenditures of government did rise significantly, from 28.7 percent to 33 percent of the economy. Was this rising expenditure reasonably within or beyond the means of the citizenry? During the period, the average real earnings of workers increased from about $12.25 per hour in 1960 to about $20.90 per hour in 2000. Paid the average wage, a year-round full-time worker earned $24,600 in 1960 and $41,800 in 2000.[9] If we assume that the costs the average worker paid to support government spending

grew from 28.7 percent of earnings in 1960 to 33 percent in 2000, then the remaining real after-tax income would leave the worker receiving the average wage with $17,540 spending income in 1960 and $28,006 in 2000—a 60 percent rise in real spending income after taxes for the same hours worked. From 1980 to 2000, the after-tax real spending increase based on the average wage, for the same number of hours worked, would be 16 percent.

As regards average wages, the growth that took place in government from 1960 to 2000, and even from 1980 to 2000, appears to have remained affordable, at least in the sense that workers had more real after-tax spending money for the same hours worked after the growth of government than before. The average pay increases per hour, after taxes, did not fall below the return that the workers' improved productivity ought to have brought.[10]

Taxes, though, rose more for some workers than for others. Social Security taxes and sales taxes, both of them regressive, were increased during the period. At the other end of the ladder, the top rates of tax on the highest incomes fell to a greater degree proportionately than did tax rates on lower incomes. These and other changes may have left some workers absolutely worse off and other workers even more substantially better off than indicated. Equally important, because of the growing wage gap between the best-paid and all other Americans that started in the 1970s, the average wage of workers rose far more than did the median wage (the wage of the worker exactly in the middle). As a result, large numbers of workers were unable to keep up with the average wage even prior to taxes. Workers whose wages failed to climb nearly as much obviously could not afford such a tax increase. For those reasons, it is likely that quite a few Americans found government less affordable in 2000 than, say, in 1980—though this is unlikely the case if 1960 is the point of comparison.

It is important to be clear about the source of the problem. That workers may have felt more pinched by taxes as the period progressed did not occur because the cost of government, in relation to the average wage, itself became less affordable to the citizenry. That did not happen. Rather, problems arose because growing numbers of workers earned below the average wage as wage inequality widened at a record-setting pace and government itself depended increasingly upon regressive taxes. These, not government's growth or size, are the developments on which the morality of individual liberty would focus attention. In relation to the average wage, government did not become less affordable to the citizenry. It remained just as affordable.

There may be situations, of course, in which taxpayers can actually be left

with less income after taxes yet still end up better off overall. When all direct and indirect costs are added in, for example, a typical American family is spending considerably in excess of $10,000 per year on health care. Suppose a single-payer health care system, financed through some form of taxation, were to deliver the same quality and quantity of health care that the family now receives, retaining the same level of choice, and do so at a cost reduced, say, by $4,000 per year. The average family would then have less after-tax income per hour of work than before. Government would appear to be less affordable. Yet the family would simultaneously end up with more usable spending income. Obviously, the issue of the affordability of growth in government must take into consideration the value of goods and services increased taxes and spending deliver to taxpayers that those taxpayers otherwise would have purchased through private transactions and paid for out of their own incomes.

Employing the Least Restrictive Means

It is not enough for government to confine itself to issues involving freedom or for the level of its growth to remain within the means of the citizens. In confining itself to issues of freedom, government must also employ the least restrictive methods possible that are known to achieve the desired end.

The growth of government with respect to assuring economic opportunity, regulating against wrongful harm, and confronting market failures conforms to this principle in a number of areas, but not all. For example, prior discussion in Chapters 2 through 4 shows how basic features of the major programs tackling issues of economic opportunity have gone far toward satisfying the obligation to use the least restrictive means, at least in broad outline. In contrast, Chapter 5 reveals that the obligation is neither always met nor necessarily even considered by the courts with respect to civil regulations addressing issues of wrongful harm, contrary to how the courts deal with freedoms of speech, conscience, assembly, and protection from searches, areas in which the least-restrictiveness principle is commonly used. More coercive regulations are unreasonable in economic intervention when it is clear and convincing that less coercive ones can control the harm just as effectively. In the criminal area of regulation, on the other hand, the very purpose of constitutional protections—involving probable cause, searches and seizures, and the various rights to an attorney and a jury of one's peers, among others—or the Court's adoption of principles such as the exclusionary rule, is an attempt to contain the invasiveness of enforcement

consistent with the ability to protect citizens from crime. Viewed from this perspective, the means government employs are in many respects less restrictive now than a century ago or at the nation's birth. A number of problems remain here, though, which I take up in the penultimate chapter.

Some of the market failures we've discussed, such as the market's tendency toward instability and its underproduction of basic research, do not involve direct threats to the liberty of any individual. Addressing such market failures requires the reasonable supposition that solutions to them make no individual worse off than otherwise would have occurred, taking into consideration the reasonable risks that we all assume. The various kinds of interventions to address market failures, described in Chapter 6, appear to meet this supposition.[11]

In cases in which market failures, if unresolved, do involve direct threats to individual liberty, the least-restrictive-means principle applies once more, just as it does elsewhere. The most important market failures in this area have to do with natural monopolies and national security. With respect to natural monopolies, technological developments have transformed some natural monopolies or quasi monopolies, as in the energy and telecommunications industries. The changed nature of those industries, in turn, led to the deregulation or splitting up of all or key parts of them during the past two decades on the argument that those industries now experienced operational markets able to provide the degree of choice necessary for individual autonomy. Deregulation also occurred within sectors such as airlines and trucking regarding matters that had previously been regulated for economic purposes rather than for reasons of public safety or other issues of liberty. Debate remains as to how successful these various acts of deregulation have been and whether some of them have gone too far. As concerns natural monopolies, however, clearly there has been an openness—arguably to an excess—to turn to less restrictive policies once conditions of natural monopoly have or appear to have substantially changed.

In the case of national security, no technological transformation will alter the reality that actions taken for reasons of national security are also likely to impinge on important aspects of the individual autonomy of citizens. The issue is how to make those actions the least restrictive consistent with protecting the nation's security and a reasonably fair sharing of the burden. Confronting the security threats posed by terrorism following September 11 abounds with illustrations. Surely nothing so invasive as the internment of tens of thousands of American citizens occurred in response, as took place sixty years ago with

American citizens of Japanese ancestry. However, Congress and the administration have acted to curtail legal protections available to foreign nationals suspected of terrorism residing in the United States and have engaged in other activities with serious consequences for the protections assured to individual citizens. For example, the administration initiated blanket, indiscriminate surveillance of mosques across the United States. It also proposed establishing a centralized database on Americans that would include bank and medical records, credit card purchases, and opinions of neighbors. In collaboration with local police, it used undercover agents to infiltrate and tap the phones of antiwar groups of American citizens, possibly having a chilling effect on speech and assembly. "We thought this type of activity was ancient history," warned Lino Lipinsky, a lawyer working with the American Civil Liberties Union.[12]

At a still more specific level, President Bush declared several American citizens as enemy combatants and attempted to deprive them of literally all protections against government action. The president ultimately succeeded in one appeals court in gaining the power to arrest and imprison such citizens without having to meet probable cause. According to the review of that court, the president need have only "some evidence" suggesting a citizen's involvement, evidence never tested through cross-examination, in order to imprison that citizen with no further right of trial. While the Supreme Court later narrowed the scope of executive autonomy, it left many questions unanswered.

No matter how one feels about these particular issues, or about the record of government more generally with respect to using the least restrictive means, one consideration must be uppermost. How well the political and administrative processes meet the standard of least restrictiveness is likely at some point to depend upon the quality with which we practice judicial review. History repeatedly shows that neither the political nor the administrative arms of government always give highest priority to identifying and using the least restrictive means able to achieve the intended end. Even if the courts are independent, they cannot be relied upon, either, unless justices themselves think in terms of least-restrictiveness principles. Of course, matters of judgment exist here. But it is clear that neither liberal nor conservative judges have this mentality with respect to all or necessarily even most areas. For this reason, we have no assurance in any of those areas that judicial review will provide the level of restraint to prevent government from exceeding its bounds that is necessary for liberty and that ultimately only judicial review can provide.

Waste and Inefficiency in Government

I have waited to discuss government's widely perceived tendencies to tolerate—indeed, positively foster—waste and inefficiency because they raise crucial yet separate issues about excessive restrictiveness and coercion. Government that spends more than it reasonably must because of waste and inefficiency will have to tax citizens at a higher level than would otherwise be necessary. Yet taxing citizens more than necessary involves requiring citizens to pay more than necessary on pain of force. This kind of coercion violates the standard calling for government to attain legitimate ends by using the least restrictive measures available and known to be able to do the job. For this reason, we have an obligation to ensure that government keeps waste and inefficiency in check and avoids spending more than it reasonably must.

Exactly how wasteful is government? My students say that, on average, government wastes about 25 cents of every dollar that government spends.

We can grapple with this issue effectively only if we understand at the start that it is frequently difficult in the public arena and human affairs more generally to measure and determine what is efficient and what is inefficient or wasteful. Consider the area of health care, in which government now spends about $540 billion annually across Medicare, Medicaid, public hospitals, and the like. There is considerable evidence, discussed earlier, that health care in the United States could be operated at a lower cost per person with virtually no individual having to pay higher costs, receive lower-quality care, or have less choice of physicians than is now the case. Plausibly, a universal single-payer system permitting private secondary insurance beyond coverage made available through the collective system could attain that very outcome. Let's stipulate that a strong argument can be made for such a claim. If so, are the government and the nation then being inefficient in carrying on with the present patchwork system? Are we being wasteful? It's difficult to say. Some people greatly value the ideal of private medicine even if it is more costly. Others think that the medical advances we've seen in the past half century would slow in the future under a national payer system; still others find it hard to believe that there won't be a loss of health care in quantity or quality for some or even most individuals through a national system.

We are dealing here with issues of values once again, what we care about most, and uncertainties about costs. This weighing of values and uncertainty about

costs occurs routinely in matters of government from the largest issues (should there be a national health care system or not?) to the smallest issues (should power lines be placed underground at higher financial expense so they are not unsightly or aboveground at lower expense?). Remember that reputable cost/benefit studies themselves reach very different conclusions depending upon what benefits and costs the studies include and how they value and project them.

Activities in the private sector, really, are much the same, with one great difference. We rarely frame these issues as ones of inefficiency or waste when they pertain to the private sector. We tend to assume instead that whatever occurs in the private sector must be efficient, almost by definition, as long as it has resulted from a genuinely competitive process. That most private-sector companies enjoy luxuriant headquarters compared with those of similar-sized governmental entities, along with pay and benefits for their executives far exceeding what governors of states and even our presidents receive, may raise questions on various grounds. But if such spending has arisen out of true competition, it is not usually considered as inefficiency on the part of the private sector. In addition, few of us would describe as inefficient the decision of an individual to purchase a Cadillac rather than a standard Chevy or to shop at Bloomingdale's rather than Wal-Mart, not as long as the private sector offered a range of choices (thus competition) and the individual is able to afford the choices he or she has made. Not even an individual acting at seeming cross-purposes—such as eating French fries and drinking diet drinks at the same time—would generally be considered an inefficient or wasteful spender.

A fair amount that goes on every day in the private sector might well be called waste or inefficiency were it to have occurred in government. In the context of the private sector, an individual consumer spending $15,000 on an umbrella stand would be labeled lavish, not inefficient.[13]

Good reasons help explain the difference. The taxpayers' money is not the same as money a private individual decides to spend on a Cadillac instead of a Chevy or on a high-priced umbrella stand. The taxpayers' money is our own money—not exclusively someone else's—and we understandably want government to exercise due care in spending it. If government exercises due care and is less wasteful, it will spend less and won't have to tax as much. Consequently, any one of us may well call the very same public expenditures inefficient or wasteful that few would consider as such in the private sector.

However, that still leaves us differing over what we each value and how much,

as with the everyday examples I posed earlier of placing power lines underground or overhead and retaining private or turning to universal health care. Or consider a still greater extreme: Should government help fund a study to learn about the love life of the beetle? Along with quite a few others, former senator William Proxmire didn't think so, with the result that he awarded the study his Golden Fleece Award, given to publicize outright government waste. Some years later, Dutch elm disease ravaged Proxmire's home state of Wisconsin at the cost of many millions of dollars. It turns out that the study he had ridiculed was concerned with the mating habits of beetles, partly in an attempt to discover how to prevent bugs like the Dutch elm beetle from propagating and spreading.

Waste, though, must have some definition that is legitimate for us to apply in appraising what government does, a meaning that we can agree upon despite the different values and outlooks we have. One possibility was raised in Chapter 5. This possibility suggests that government is wasteful whenever it spends more than is necessary to attain the very *same* policy end at the very *same* level of quality, assuming the policy end is appropriate to liberty. We can agree that government is misspending if there is a known cheaper alternative, say, through the private sector, able to attain the same end with the same quality, again assuming the policy is in line with principles of liberty. The same conclusion would seem to follow whenever spending on its face is unnecessarily excessive—as would appear so, for example, with reports of welfare queens receiving hundreds of thousands of dollars from government, or purchases of $435 hammers and coffee pots for $3,000, or cases in which it is taking several people to do the job of one.

When an alternative can do the very same job for a lower cost, then, government is wasteful unless it takes up and uses that alternative. The movement of government toward the privatization of services, contracting them out, and choice through vouchers or other devices derives from this principle. It is instructive here that comparisons of the efficiency of public-sector and private-sector entities delivering the same kind of service often get mixed results. It is not the case that private enterprises always outperform governmental agencies, or even nearly always. Some private-sector producers are less costly than government, perhaps more often than not. But a fair number are just as costly, sometimes far more so.[14] This reflects government's own experience with privatization. When public projects are opened to all, private contractors end up winning the competitive bidding process against public agencies just about half of the time.[15]

Of course, we need to be careful in concluding that less costly private bids in

fact do attain the very same ends. Ends important to individual liberty include the opportunity to earn a minimally adequate living through work in a reasonably safe workplace. The most competitive bid, however, may well achieve its efficiencies mainly through paying some or most employees less than a minimally adequate wage, or by providing little or no health coverage, or by subjecting employees to greater safety risks at work. We do not know how often private contractors would end up with the most competitive bid unless those kinds of considerations have been factored in. An equal concern of liberty has to do with assuring that political favors do not occur through privatization, such as the receipt of large campaign donations from contractors who secured public contracts, constituting a new form of the old spoils system.

Suppose, though, that a decision to privatize was well aligned with all the ends of individual liberty. Suppose, also, that it achieved the very same policy goal at the same level of quality as public provision yet did so at a lower cost. If it meets each of those conditions, privatization would then produce improved efficiency in an appropriate way and clearly merit the conclusion that prior government spending had been wasteful.

Some years ago the U.S. Chamber of Commerce found that fraud, embezzlement, and other forms of white-collar crime by employees cost businesses 4 percent of their revenues on average.[16] Inefficiencies in private philanthropic activities often run far greater still.[17] Every human endeavor contains some waste and inefficiency. Is waste in government excessive? We cannot know for certain, of course. However, it is unlikely that what I would call *certifiable waste* exists on any egregious scale in government. In the case of the domestic programs taken together, it may not exceed in total the 4 percent the Chamber of Commerce estimated businesses lost from their employees' white-collar crime alone.[18] By certifiable waste, I refer to waste that is clear on scientific or objective grounds, that is, where no reasonable differences of view remain about values and measurements. Comprehensive investigations suggest that that sort of waste—waste that is certifiable—represents a very low percentage of overall spending on domestic programs, likely on the order of 5 percent or less.[19] Indeed, many widely publicized stories chiding government for outrageous extravagance, such as that claim about "welfare queens," or the one about the $435 hammer, or the $3,000 coffee pot, turn out upon investigation to be vastly more complicated or outright mistaken.[20]

That is not to say we should relax about the issue. The fact that claims about waste and inefficiency are often subjective matters does not mean that they

should carry little importance in the halls of government. No matter how subjective our thinking about any particular instance, people are right to believe that government should be cost-effective. For this reason, issues concerned with waste and inefficiency are ubiquitous topics of discussion and debate in the governing process. Few members of the public hesitate to speak their mind on these matters. Many programs are not simply routinely audited but brought under evaluation through cost/benefit analysis, outcomes assessment, effectiveness research, or some other form of appraisal, or they are "sunsetted" so as to remain in force only a limited number of years unless they are reenacted. They are subject to media attention and probing and to a multitude of investigative and oversight bodies within both the legislative and executive branches of government. Movements to privatize, contract out, provide choice, create performance measures, incentivize public-sector employees pay—and the list is long—all indicate not simply the pervasiveness of the dialogue involving issues about government efficiency but also the influence such concerns have. If what I have called certifiable waste exists in domestic policies but is not egregious, as indicated earlier, it is likely because the issue has been and continues to be a ubiquitous topic in public discussion.

Conclusion

Individual liberty involves an obligation to foster restrained government, not small government. With regard to the idea of liberty, restraint and smallness in government are not synonyms, for good reason. A commitment to keeping government small may well come into conflict with fulfilling obligations that we have to one another and that are necessary for liberty to be morally tenable within its own terms. Preferring small government above honoring those obligations is, in effect, to give individual freedom and the obligations of freedom a back seat. Restrained government does not face that problem. Asking government to confine itself to addressing issues of individual liberty, to be affordable, and to use the least restrictive means that can attain the ends of individual liberty need not conflict with any of the obligations we have to one another in order for freedom to be genuine. In many ways—though by no means all, as described in the prior pages—our government has succeeded in remaining restrained. Surely, at the beginning, the Founders themselves must have sought a restrained government, not a small one, when they created the larger federal government out of the then-existing confederal one.

Today, the view that equates individual freedom with less government seems valid to many Americans—true, almost, by definition, really. Such an outlook, though, weakens the nation's ability to honor the obligations of freedom. We will see in the penultimate chapter that quite a few problems connected to freedom and its obligations have been mounting, largely unattended, for nearly thirty years now. They affect the lives of a majority of Americans in very essential ways. And solving them requires us to act together collectively as a society, through government. Yet we will be unable to progress very far in tackling those problems unless we become able to differentiate between restrained government and small government and understand that liberty, in order to be moral, calls for the former while frequently contradicting the latter.

CHAPTER EIGHT

Societal Decisions and Individual Liberty

Making decisions as to how to deal with any of the issues of freedom we have examined concerning economic opportunity, wrongful harm, or market failures, of course, requires a process for making decisions. Because they are issues of freedom, they are inherently societal issues, ones, finally, that only the collective society can resolve. Few of the issues can be decided at the level of the individual. And whatever the society decides—including doing nothing—will powerfully influence the lives and experiences of many citizens.

We have taken up a multitude of such issues in the preceding chapters. Consider, for example, the question of whether to expand Medicare to cover the costs of pharmaceuticals—just a tiny part of the larger issue involving private as opposed to universal health care. Even that larger issue is simply one of a long line of issues within the general areas of adequate economic opportunity and market failures. Yet, though it is merely one subpart of what is itself a subset of far larger problems, the prescription drug issue and its resolution, no matter what the resolution, could not avoid having serious consequences that range across much of the population. Medicare with no prescription benefit appears to have worked reasonably successfully for those seniors with few pharmaceuti-

cal needs or with sufficient income to purchase their own prescriptions. By contrast, it often failed those with moderate income, coupled with the pharmaceutical needs typical of many seniors, and no realistic alternative opportunity for most of them, currently or in the past, enabling coverage for them to be affordable. Whether Medicare should include the costs of pharmaceuticals, be universal or means tested, cover all costs or only some, deliver benefits through Medicare or competing private insurance companies, and be financed through tax increases, cuts in other programs, or enlarged deficits are only a few of the many questions that loomed. Ultimately only society could answer those questions. Moreover, each answer (even to do nothing and keep the status quo) would have an effect on many citizens—not only most senior citizens, thereby possibly also affecting many of their children, but also each taxpayer both now and in the future as well as every beneficiary of other programs, not to mention many different kinds of businesses.

As is typical for these issues, the questions that must be resolved here are tough ones. Often there is no single correct solution but a range of possibilities. The principles of freedom can steer us through the dilemmas, however, telling us the process we must follow to get to the answers.

How can societal decisions that we must obey, such as the issues involved in Medicare, be made consonant with individual liberty given that they are necessarily decisions that must be settled by the whole society, beyond the reach of decision by the single individual? Even though such decisions are collective ones, many of them will deeply affect our individual lives and what we can and cannot do. Here we must remember a core principle of freedom: every person is to be seen as an end in his or her own right, equal to every other person in this way. Assuming that individual liberty is about regarding each individual as an end in his or her own right, never simply an unwilling instrument of another's will, it follows that each person's freedom is of equal importance. Thomas Paine put it well when he said: "Whenever I use the words *freedom* or *rights,* I desire to be understood to mean a perfect equality of them. . . . The floor of Freedom is as level as water."[1]

If people are ends in their own right and each person's freedom is equally important, there must be a genuine sense in which we are all equal in the process through which collective decisions are made that shape our lives and that we all must obey. Each person must somehow be able to be a part of the decision-making process so that the decisions made collectively as a society belong to everyone. This principle of equal standing must define the process society uses for making its collective decisions.[2]

Whether the way we make collective decisions provides a sufficient degree of equality to all individuals is a crucial matter, then, that goes straight to the heart of liberty that is genuine. A collective decision-making process that reaches decisions regulating us all but that is fundamentally flawed with respect to equal political standing does nothing less than debase the freedom of every person who is left out or diminished. Those left out or diminished, to the degree they are, live under a form of government akin to subjection, obligating them on pain of force to obey somebody else's laws whose political weight arbitrarily exceeds their own.

Making Decisions among Political Equals

The Political Obligations of Liberty

This imperative of equality of citizens points to another series of mutual obligations we have to one another in the name of individual liberty, very basic ones. The obligations have both political and legal sides. Among the most fundamental is to establish and uphold political equality, or equal political standing. Many of the political and civil rights that each individual must possess and society must protect as a foundation for equal political standing are familiar. Necessary for each citizen to be able to form as well as voice his or her own views, they comprise the core rights of freedom of belief and conscience, speech, assembly, organization, publication, and the right to the availability of multiple independent sources of information[3] and to leaders who seek and believe they are telling the truth about policy actions and issues.[4] Essential to the effective use of those rights, also, is an education about them—not simply about their history, importance, and purposes, or about the substantive world in which they are to be used, but also providing opportunity to gain the communication and thinking skills necessary to their use.[5] There is another less familiar right, as well. This has to do with the availability of time to be able to form views and articulate them in the political process. Two distinct concerns exist here. Having all the other political rights would mean little if political decisions were made without any public notice, so that few people ever became aware of them with sufficient time to be involved in the decision. Similarly, all the other rights would mean little if the available work enabling individuals to make a basic living left them little or no time to utilize their rights.

Rights have more than an individual application. They are expected to take effect in a collective setting. For that reason, the process by which the society

reaches its collective decisions must abide by the same principle of equal political standing. This collective political process includes both the selection of representatives able to make and change law and how the elected representatives themselves come together to make their decisions.

Once again, the basics are familiar, mixed with some intriguing surprises and challenges. Each citizen must be accorded an equal vote in the selection of representatives, elections must be periodic with limited terms of office, and election outcomes must be determined by a method that counts each vote as equal (in our system, generally a majority or a plurality). Political equality also requires that each representative's electorate be reasonably equal in size. Any other voting mechanism or device for representation that allows a vote for a candidate or policy supported by a lesser number of citizens to override the vote for another candidate or policy supported by a larger number of citizens would violate the idea of the political equality of each citizen.[6] It would say that some citizens and their lives and interests are more important than is the case for other citizens. Both the Electoral College and the equal representation of states rather than citizens in the United States Senate have their justification in principles of federalism, not principles of individual liberty. Whenever an overall election result differs from an overall popular majority of the vote, as occurred most famously in the 2000 presidential election, it violates the principle of individual liberty that the vote of each individual should have equal weight.[7]

The right to a vote and to have that vote count equally assumes free elections, that is, that the elections are not corrupted or fixed. There must be neither unreasonable restrictions against alternative candidates getting on the ballot nor the establishment of political boundaries that artificially and unreasonably undermine competition;[8] registration of voters must be accessible to all, easily carried out, and publicly reviewable; casting the vote must be secret so as to avert intimidation; and counting the vote must be a public procedure open to public inspection and review by all.

The institutions representatives enter, no less, must follow rules that respect the principle of equal political standing for all citizens. As in the elections, each representative must have a single vote that counts equally. Decisions that the representatives reach should be made by the larger number of votes within the elective body, and there must be practical ways to get around the power of numerical minorities to keep items from reaching the floor for debate or coming to a vote.[9] Rules enabling committee chairs, committees, or minorities in the legislature to block bills from getting to the floor or reaching to a vote, such

as a Senate filibuster, run counter to this precept unless the rules specify effective ways for the majority to assert itself[10] or the procedures are employed specifically to prevent a majority from violating the liberty of others. A Senate filibuster used by senators from the most populous states to avoid defeat by senators from states with far smaller populations might serve that purpose. So might a filibuster used by senators representing a majority of the electorate to block nominees thought questionable from a president who had gained office without a plurality of the popular vote.

Finally, the process of decision in the elected body must be open—not secret—both to all representatives and to the wider citizenry. This means that meeting agendas must be available in advance; the meetings and debates in which decisions are made, whether formally or informally, must be open to the public; and the votes themselves must ordinarily be open to public view. A deliberative process that gives rise to collective decisions containing the usual three readings over a number of days (often preceded by committee examination of the proposed action) certainly provides adequate notice. Implementation of usual open-meeting rules for all gatherings in which decisions might be made or formulated for later formal vote is sufficient to ensure a reasonable level of openness. Last-minute switches of bills (or presentations of original or revised bills) without notice or reasonable time for potentially opposing representatives to examine and think about them, let alone the public, does not.

Equal Political Standing and Political Influence

The equal political standing to which each person has a fundamental right should not be mistaken to mean that each person's influence over decisions will end up being the same as everyone else's. The influence of any particular individual or group may vary for many good reasons consonant with freedom. Among them are instances when greater influence can be expected to add to the quality of debate and decision making—influence coming from such factors as the special factual knowledge or expertise that individuals are considered to have, their credibility and trustworthiness, the power of their logic and reasoning, their wisdom, how many other individuals they are thought to reflect, and so forth.

A Historical Backdrop

We often imagine ourselves as having been a freedom-loving nation since our beginning. After all, we were born from the noblest expression of freedom

in human history, the Declaration of Independence. In it, we proclaimed the sacred principle of freedom not simply that we are all created equal but also that the authority of government derives solely from the governed. The obligation to establish equal political standing as the right of every individual stood at the heart of the nation's expressed purpose from its very birth.

The reality was quite otherwise, of course. How terribly distant we were from fulfilling that principle of individual freedom, indeed the Revolution's *own* rallying cry, "No taxation without representation."

We started with a very narrow franchise incorporating barely one in three of all adults, and it took the following 170 years to make the vote nearly universal.[11] The path never was an easy one. Successive groupings of citizens gained the vote over the first 150 years, first propertyless white males, then (at least formally) black males with the abolition of slavery, then Native Americans and women, and amid them individuals from all religious backgrounds. Laws banning poll taxes and literacy tests, adopted only forty years ago, eliminated legal hurdles preventing minorities from exercising their formal right to vote. At the same time, reforms of state legislatures and local councils to create election districts of equal size applied that core element of the principle of an equal vote to all state and local governments as well as to the federal House of Representatives. During the past century or so, voter registration procedures became progressively simpler and more open, though problems remain, and the vote itself became secret. Nearly every citizen today has the right to vote. Issues regarding the franchise, apart from how election procedures are applied, now concern closer to tens of thousands rather than tens of millions of citizens. In addition, selection to individual seats in the Senate now conforms to direct popular vote, in contrast to our first 125 years, although the Senate continues to violate the right of individual citizens under freedom to an equal vote in that each state has two senators notwithstanding the highly unequal populations of the states.

In the past century, as well, nominations for candidacy to political offices became subject to a popular vote through primary elections. Those primary elections, in turn, helped eliminate the control of party machines and their political bosses in many states and cities across the nation. Laws granting people the right to public information and requiring meetings of governing bodies to be open to all and to give reasonable notice have increased the direct access of citizens to the governing process. They were enacted in a number of places only during the past two generations. Legislatures changed their rules, too, so that many more votes are now recorded and subject to public scrutiny. Initia-

tive and referendum procedures, first adopted in the nineteenth century, have spread to half or more of the states. They allow members of the public itself to formulate and vote directly on proposals for law.

Each of these many developments, and others, have brought progressively greater formal political equality and voice among citizens to the governing process, irrespective of the limitations soon to be discussed. At no time in our history has the political process been more open or formally egalitarian than during the past several decades.

Barriers to Political Equality

All is not well, though. Despite all those advances, several substantial barriers continue to block the way to political equality among citizens, barriers that make us unacceptably unequal as free persons. One of them involves the unique influence of money in politics.

Even here considerable progress has occurred. We have come a long distance from the days when outright bribes of both public officials and voters were commonplace. With respect to election campaigns at the federal level, the bedrock law we have today was enacted in 1974 in the wake of Watergate. It limited direct financial contributions by individuals and political action committees to election campaigns for federal offices and, in the case of the presidency, established an option for the public funding of campaigns. Legislation adopted in 2002 further restricted contributions by individuals and political action committees to national political parties—the so-called soft-money reforms. It also restricted supplementing the campaigns of federal candidates within sixty days of an election with commercials paid for by independent campaigns that mention a federal candidate's name or are clearly directed to campaigns for federal office.

Those reforms, however, still leave wide scope for the role and influence of money. Individuals are able to finance their own campaigns with unlimited sums of their own money, and they can do the same with independent campaigns for other federal offices prior to sixty days before an election (and up through the election if the connection to the federal candidate is sufficiently indirect). In addition, they can finance campaigns for initiatives and referenda at the state and local levels to their heart's content, can fund state and local candidates subject to varying regulations there, and can give money without limit to any other political cause or group.

Does this pose a fundamental problem? The involvement of financial contributions in the governing process disturbs equal political standing in a way that

no other political resource does. What's the largest financial contribution to a federal campaign? Jon Corzine of New Jersey contributed more than $50 million to his own campaign for the United States Senate. At the local level, Michael Bloomberg became mayor of New York City having contributed more than $60 million to his campaign. You can't bribe yourself, so contributions to one's own self might seem to pose little problem. Yet one of the consequences of being able to bankroll one's own campaign is that wealthy people can assure that their own campaigns will have the funds they need.[12] Although the ranks of millionaires make up fewer than 10 percent of American citizens, they constitute almost one-half of all incoming members of the House of Representatives and Senate.

You're greatly advantaged if you are wealthy, but being a millionaire obviously isn't absolutely necessary to successful candidacy. Access to individuals who are at the top of the income ladder virtually is, though. A good part of funding for political campaigns comes from the top earners. They contribute more than 60 percent of all money solicited by campaigns.[13] As a result, the very well off act as a kind of gatekeeper. For federal offices or the governorships and other statewide offices of many of the states, quite often only candidates who either are wealthy themselves or have access to individuals with high incomes can mount an effective campaign. As the political journalist Joe Klein observed, "The formula [for winning elections] is well-known: mobilize your most avid supporters—the party 'base'—without offending your financial backers."[14] The party base to which Klein refers generally involves hundreds of thousands or possibly millions of voters, whereas the major financial backers, at most, involve a few thousand or so. Thus do several thousand citizens or so gain a political weight that is similar to hundreds of thousands or millions of citizens.

People frequently differ about the precise impact of money on the governing process. Not everyone sees it so definitively as former Republican senator Alan Simpson, although the majority of justices on the Supreme Court concur with his conclusions. "Donations from the tobacco industry to Republicans scuttled tobacco legislation," Simpson observed, "just as contributions from the trial lawyers to Democrats stopped tort reform."[15] At minimum, however, not a single public official, analyst, or observer will deny what is obvious: big financial contributions secure an individual direct access to public officials and a personal hearing from them, often on a regular basis. That privileged access and level of attention are unavailable to most other individual Americans. Money is clearly a big factor in getting heard and taken seriously. And it's not just in the corridors of power that money plays this kind of role. In the public forum, as

well, it often costs a lot of money to get visibility for a message or cause.[16] Many independent issue campaigns, referenda and initiatives, and interest group causes are funded through financial donations from wealthy individuals.[17] How much do financial contributions to political candidates and causes mean? Here's how a Texas oilman and wealthy political contributor named Roger Tamraz responded when a United States senator asked him if he was registered to vote: "Am I registered to vote?" he said. "No, Senator, I think money's worth a bit more than the vote."[18]

True, most individuals have other kinds of resources available that they can use for political ends. They can apply their own personal time and energy, for example. All of us are able to do that, and individuals who put in a lot of time and energy are likely to have more influence. Is money, then, any different? One thing different about money, by comparison, is that it is nearly an infinite resource. No one has more than 24 hours a day. A typical individual having to make a living might reasonably be able to volunteer perhaps 1,000 hours of his or her time and energy over a year. Someone contributing $1 million to various political causes buys about 100,000 hours of the time and energy of others—many orders of magnitude beyond what any average citizen can contribute. And some wealthy individuals contribute $5 million, $10 million, or more to the political causes they favor. Early in the new millennium, the top individual donor to federal politics, Haim Sabin of Los Angeles, gave a total of $9 million in the span of a single year; another (Fred Ferguson of Chicago) gave $7 million; and still another (Stephen Bing of Los Angeles) contributed $6.7 million.[19] With money having no natural upper boundaries as a political resource (absent regulation) the way personal time and energy do, no wonder one wealthy individual who delivers substantial donations gains a level of personal access and hearing in the corridors of power that otherwise generally takes thousands of ordinary citizens to attain.

Nor is it the case that individuals are free to become millionaires, if they decide to, in the way they are free to deploy their time and energy. Only a small proportion of individuals who work long and hard do in fact become millionaires; indeed, millions of workers have failed to see much of a rise in their real pay at all even after many years on the job.

Yet voters are sovereign in the end, isn't that so? If voters don't like what they're hearing, they're the ones who ultimately decide at the polls. They can defeat candidates, and they can reject initiatives and referenda. In this way, because we each have one vote, we all end up having equal political standing, don't we?

One problem with this claim is that it has no application to the election of officeholders—there is no box on our ballot saying "none of the above." Someone will be elected to fill the office. Here is where the gatekeeper role becomes vital. For federal and statewide offices, with increasingly fewer exceptions, a candidate must either be wealthy (again, nearly half the incoming members of Congress are millionaires) or have access to well-healed donors in order to wage a campaign capable of getting a reasonably full hearing in the public forum.[20] Within a major party, even the ability to make a serious run to gain the party's nomination for federal or statewide offices often first depends upon the candidate's ability to demonstrate access to sufficient financing to mount an effective campaign in the subsequent general election.

In the case of initiatives and referenda, although it is true that voters decide in the end, a campaign can be made politically viable through only a single wealthy funder bankrolling it, surely a few, in a way no other ordinary individual could hope to do with any resource available to him or her. Unlike any other individual citizen, that is, a single wealthy individual, or several, can set the political agenda. It generally takes many thousands of ordinary citizens to do the same. And unless a few wealthy individuals actively oppose, or thousands of ordinary individuals use lots of their time and energy, a single individual's well-financed campaign that gets an initiative on the ballot will have a decent chance of victory against a weakly funded opposition. The equation of a few wealthy persons with the political weight of many thousands of individual citizens once again describes the reality.

Does money add something important to debate or to the process of decision making that justifies the role it plays? Individuals appropriately have varying levels of influence based upon estimations of their factual knowledge and policy expertise, credibility and trustworthiness, how many other individuals they purportedly represent, the power of their reasoning, and other such factors. Money, of course, can be used to develop information about policy useful to candidates and policy makers. At the same time, a fair amount of what financial contributions are intended to do is simply to increase the volume of expression of the candidate's or cause's message and get it out more powerfully before the public. The ability to add significantly to the volume of expression through financial contributions, though, obviously affects our equal standing because somebody else's voice then is able to be presented and heard considerably more so than is one's own.

But even if money does amplify certain voices and produce substantial inequalities in this regard, we're dealing with political discourse here, aren't we?

The wealthy are simply expressing themselves through their political contributions. Contributions are speech in this view, and, like any person's speech, they cannot be regulated without violating liberty.

Clearly this is not the case. Money is a resource. It is not speech per se, as the very way we look at corruption makes clear. To see the difference, consider that no one would ever think it morally wrong were a candidate's views and vote on a given issue to change as the result of the speech of another person about the substance of that issue. By contrast, many would think it morally quite questionable if the candidate's views and vote on the issue had been influenced by the receipt of a large contribution of money to the candidate's election campaign. If provable, that would very possibly be a crime. The substance of speech and contributions of money are two different things.

Actions that the public takes when it elects officeholders or adopts initiatives and referenda are authoritative decisions having the force of law. In making those decisions, the public acts as an authoritative body no different from a legislature or a court. Imagine either a legislature or a court allowing debate to proceed based upon who bids the most to purchase the microphone rather than on some rule of proportionality of access to the microphone. Access to the debate based on purchasing the microphone would seem so out of line as to be preposterous. As authoritative decision-making bodies, legislatures and courts at the national level and throughout the country all routinely place regulations on debate that attempt to apply principles of political and legal equality *without anyone ever claiming that such rules violate free speech*.

Without sufficient regulation, financing politics through contributions creates significant political inequalities that undermine the equal political standing of citizens required by liberty in the making of public decisions. Many Americans feel the inequalities: nearly two-thirds have concluded that public officials don't care what people like them think. An equal number believe that government is run by a few big interests looking out for themselves rather than for the benefit of all.[21] Those are terrible commentaries on a nation that proclaims to be faithful to individual freedom. As the philosopher John Rawls pointed out: "Liberties . . . lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate."[22] When a government exercising coercive powers over the lives of all citizens hears and responds significantly more to individuals who make large financial contributions than it does to other individuals, the latter individuals live under a form of subjection.

A Few Other Barriers

I mentioned earlier that at times the formal election process itself operates in violation of the principle of equal political standing. There is the matter of the composition of the Senate itself. We live under laws that must gain passage in a legislative body in which 47 million citizens living in twenty-five states are accorded fifty out of one hundred votes whereas a greater number of citizens living in California and New York, 52 million, have a mere four votes. It matters, too. In 2000, for example, citizens of the twenty-five smallest states, which contain barely 15 percent of the nation's population, gained a return from the federal government of $1.39 for every tax dollar they sent to Washington. By contrast, citizens of the ten largest states—states containing three times the population of those twenty-five states but with only two-fifths of their vote in the Senate—got 89 cents back on the dollar. Californians and New Yorkers received 86 cents back on the dollar.[23] To be sure, other factors contribute to this result. The discrepancy isn't entirely due to the absence of an equal vote for each citizen. Undoubtedly a fair measure of it is, though.[24]

On its part, the presidential election of 2000 revealed numerous problems with the registering of voters, the ballots, and the counting of ballots in Florida and elsewhere—all of them raising legitimate questions about equal political standing—resulting in a hotly disputed election outcome.[25] There's no dispute about one thing, though. No matter who actually prevailed in that Florida election, the presidential candidate who won the most votes nationally never became president. We installed a president who failed to win a plurality of the votes. He alone knows whether he moderated his policies on that account, in deference to the principle of liberty that the majority should rule. There is little evidence in the record to suggest that he did, though, or that he or his supporters acknowledged publicly to the nation their understanding of the importance that fewer voters supported him than supported his opponent.[26]

Protecting Numerical Minorities from a Self-Interested Majority

An American Invention

James Madison recognized early on that equal political standing can create problems of its own for liberty. He worried that, by requiring majority rule and an equal vote, the very principle of equal political standing necessary to liberty

could ultimately also come into conflict with it. If the majority has final authority, what is to keep that majority from acting solely on its own bald self-interest, or momentary passion, in a manner as to violate the liberties of a numerical minority?

This is the famous question that Madison posed. He believed an answer lay in creating an expansive republic containing a multiplicity of interests and operating under checks and balances, along with an enumeration of the rights of freedom in the Bill of Rights and the establishment of judicial review. This combination alone, he thought, might be able to contain politics should it descend to mere self-interest and enable it to function in a manner compatible with the protection and preservation of individual liberty.

Madison's solution—and ultimately the American solution—calls for a process by which laws are subject to a two-pronged test to survive. This test includes a procedure for enacting legislation that is normally lengthy, today involving action in committee and subcommittee in each house as well as decision on the floor.[27] Thereafter, a possibility of testing the law in the courts occurs through judicial review.

Regarding the test's first prong, the legislative process itself is generally long and complicated. The sheer length of time that the combination of committee deliberations and three readings through two legislative chambers usually takes often helps dilute the impact that immediate passion has on policy decisions. In addition, a vote by the whole representative body makes it probable that at least a few of the representatives will have no direct self-interest regarding the matter at hand. When an issue has reached the stage of a collective vote, representatives with parochial self-interests will very likely need to gain support from at least some other representatives with no such interests.[28] Such characteristics raise the probability that bald self-interests, even as they may exert disproportionate influence over policy decisions we are all obliged to obey, will not be able to go so far as to take away the most elementary liberties of citizens.

In the end, though, no set of procedures, no matter what they are, can surely prevent interests with self-serving or ideological motives from building majority coalitions that invade and overrun the most fundamental of liberties. Nothing, ultimately, can be certain to stop a legislative majority from forming and passing laws that violate the rights of particular sections of the citizenry, for example, to be free from unreasonable surveillance or searches of their homes, or that subject them to arbitrary rules and harsher regulation. No set of political procedures, either, can cause a majority to provide the minimum financial

support necessary to carry out certain rights properly—for example, the right to education. Ultimately, even the most basic liberty may not be safe from a political majority that is determined.

Judicial Review

For this reason, there needs to be a possibility to test every public action and inaction—whether involving laws or regulations—against principles of individual liberty. The test of judicial review, which is the "second prong," offers this possibility.

The test of judicial review can work properly to protect individual liberty only if judges are independent of political pressures and reasonably neutral and they give priority to principles of individual liberty. Since the nation's birth, we have paid a lot of attention to this obligation of independence. To protect their independence in office, federal judges are chosen for life upon good behavior, and their salaries cannot be reduced while they remain in office. States and localities have their own procedures, but many of them, too, have protecting the independence of judges as one of their aims.

Independence, though, should not be confused with neutrality or open-mindedness. If the selection of judges is highly political, the justices so chosen may well have pronounced ideological prejudices even though they are independent. Instead of being impartial and unbiased, such judges will operate according to not simply mild leanings but a strong liberal or conservative stamp, analogous to a liberal or conservative policy agenda. Many times, with every hope and expectation, they are nominated for that very reason. Their strong bias, in effect, becomes a criterion for their nomination. That the very timing of Senate hearings for judicial nominees follows partisan patterns (depending upon the party of the president and the majority in the Senate), and that justices themselves have been known to time their retirements based upon the president who will name their successor, are significant statements in themselves. Securing a five-member majority with a consistent bias on the highest court can enable a partisan ideological agenda to go pretty far.

Courts are supposed to examine matters before them in an objective and impartial way. The "cult of the robe" cannot assuredly bring such objectivity and open-mindedness where the biases of judges are very pronounced. As a consequence, we should be suspicious of candidates for judicial office who have strongly biased records as revealed in past decisions, writings, and other actions. It would be possible to nominate and approve candidates for judicial

office based upon their judicial competency *and* the absence of strongly pronounced ideological cast in their past records or to use merit selection. Filling positions with nominees having a strong common ideological stamp risks making the judiciary into simply another political branch of government, part and parcel of the political apparatus and, ultimately, little more than an arm of the national majority political coalition.[29] The writer Deborah Sontag voiced her fears: "It would certainly help many Americans sustain their faith in the system if [the judges] could become less ideological, less predictable and less political. That doesn't appear to be on the horizon, though, not in the foreseeable future."[30]

It's an old problem, not one of today alone. Democrats and Republicans, liberals and conservatives have engaged in it. It goes back to the very start of the Republic.

Two years into his presidency, George W. Bush made it clear that he intended to nominate and to continue to nominate "good, conservative judges."[31] He explained, "I want people on the bench who don't try to use their position to legislate from the bench."[32] That sounds precisely like the criterion we want. "People . . . who don't try to use their power to legislate from the bench," indeed, does describe the judicial mentality that genuine freedom calls for. However, appointing strongly conservative (or liberal) judges attains an end opposite to the one President Bush claims to seek—and also contrary to what liberty requires.

The reason is that many, if not most, rulings (like the one concerning the president's own election) involve areas in which exactly what the Constitution's Framers meant, as well as what legislators in the several states had in mind when they voted on the Constitution and the amendments, is itself uncertain and marked with contradictions. Applying the Constitution and the law is not at all automatic, as some might like us to believe. There is no way to get around the need to interpret what the words of the Constitution and its amendments mean. In effect, judges are formulating policy when they engage in interpreting the Constitution. Legislating, however, goes beyond just formulating policy by interpreting the Constitution. Legislating also involves having the equivalent of a policy agenda, such as a partisan one, and being selected for judicial office with that agenda as a main criterion. Further, it then involves following through with that agenda in judicial rulings interpreting the Constitution and laws to the point of negating precedents and voting as regularly with one side against the other as is the case for a typical legislator when voting in

the legislature. Within the mind of such a judge, no reasonably impartial or open-minded hearing is really going on.[33]

No case could make it clearer than does President Bush's own election how judges with pronounced conservative ideological biases (including the two justices President Bush has said he views as role models, Justices Antonin Scalia and Clarence Thomas) legislate from the bench. Their opinions in *Bush v. Gore* would have been predictable based upon their ideologies and what served the political interest of those ideologies, notwithstanding that how they ruled in that case contradicted precedent as well as many past opinions of their own. For this reason, their votes might have been forecast even prior to the presentation of the arguments and the evidence. Numerous key areas, including state relative to federal powers, gun control, abortion, and civil rights among many others, find the same level of predictability when judges with consummate conservative records vote to override legislative enactments as well as past judicial precedent. It is the same for solidly liberal judges. In selecting strong conservatives to fill the federal courts, President Bush has a particular legislative agenda in mind, and he is nominating legislators, not judges. Make no mistake about it.

Some say that the Senate should exercise its power to confirm grounded on the qualifications and competency of the nominee, not on the nominee's ideological bent. In this view, it is inappropriate for ideology to become a consideration in the Senate. That is generally very true. Yet it becomes impossible to carry through with this position, and undesirable from the standpoint of the neutrality of judges that liberty calls for, when the president has employed ideology as a criterion for nomination. The president and the members of the Senate together must refrain from using issue agendas as criteria for nomination and approval or turn to some other method of selection.[34] Unhappily, the trend today at the federal level appears to be in the opposite direction.

In order for the nation to act morally according to individual liberty, one bias alone is appropriate. If the nation indeed is one of liberty, courts have the responsibility to uphold that value when it comes into conflict with other values. Here, the judiciary has displayed exactly this kind of tendency, for a lengthy period now, regarding First Amendment issues related to the core liberties of speech, conscience, press, and assembly. There are areas, though, in which the courts have clearly failed to show deference to individual liberty, for example, when they allow federalism and state power to override principles of individual liberty. A problem for the U.S. Supreme Court exists here. The problem is that the Constitution itself expressly contains such conflicts. Both the Electoral College and the provision that all states have equal representation in

the Senate regardless of population are examples. Very often, though, conflicts between liberty and other values in the Constitution come from wording that leaves considerable room for interpretation, as in the case of the meaning of the right to an attorney in the Sixth Amendment, or the meaning of the protection of states against suits in the Eleventh Amendment, or the meaning of the Fourteenth Amendment as it pertains, say, to separate but equal or to effectively prohibiting a recount of the vote in Florida in the presidential election of 2000.[35] Where there is gray area, the bias of judges in a nation based upon individual liberty should be in the direction of supporting actions and results most consistent with the moral principles of individual liberty. Judges must live up to that obligation. Otherwise, the freedoms in question of all those individuals whom the Court's decisions disfavor will have been effectively dismissed and some other value than freedom put in their place.

The one bias appropriate to a judge, then, is a bias that seeks out the reasoning of liberty. Under liberty, judgments about a given law and the law's legitimacy must be based upon the reasoning of liberty wherever that is possible within the Constitution. What about the role of other principles, such as religious ones? Preference for a religious principle, obviously, is fine for an individual citizen to have and to obey for him- or herself. But it is highly questionable for such a principle, in its own right, to influence a judge when making authoritative decisions that others must follow or, for that matter, for lawmakers or the general population to impose their religious preferences. To do so gives authority to a particular religion—or to religion generally—which compromises the neutrality that liberty promises and requires in the area of conscience. A given religious principle or source may find strong support in a principle of liberty, such as the principle of wrongful harm. There is much overlap between moral principles found in a number of the Ten Commandments and the moral principles of liberty, for instance. Liberty is a profound morality. Reaching judgments that are backed by principles of liberty—principles also proclaimed in religious teaching—is appropriate. By contrast, using religious stances and sources on their own regard, alone, without firm support and justification in the tenets of liberty, is an improper determinant of decisions by which we all must abide and an attack on the liberty of individuals those decisions oppose.[36]

Equal Standing and the Application of Laws

Laws and regulations are meant to be applied to the behavior of single, discrete individuals. This, too, requires a process of decision, or judgment, that

must satisfy one final set of obligations we have to one another under liberty. Decisions involving whether individuals have violated laws and regulations are typically made through the judicial system or in quasi-judicial action through administrative adjudication. Violations usually result in sanctions levied against that individual's liberty. Such sanctions come in the form of fines against the person's property, loss of his or her very autonomy through imprisonment, or even loss of life itself.

I concentrate on sanctions costing individuals their personal autonomy or their life. Here we have obligations to victims and society to find the guilty and hold them accountable. Doing that also involves obligations to the accused. Most of those obligations are commonly understood today. Citizens must have reasonable notice through passage of a law or regulation that certain behaviors are to be treated as wrongful. In addition, the proscribed conduct must be clear, not vague or ambiguous, and the contemplated punishment must be proportional to the infraction. Citizens accused of having engaged in proscribed conduct must then be able to have their day in court, as an equal. Central requirements of the judicial process include the right to competent defense counsel and a fair trial using impartial procedures, with the burden of proof on the prosecution. The gathering of evidence by the government, both before and after indictment, must follow known and fair procedures that open all evidence to the accused in a timely manner and that protect the accused from unreasonable searches and seizures. The right of the accused to remain free while awaiting or on trial, when practicable (balanced against the possibility of further crime or flight, for example), must be respected. The objective of a full and fair trial that equal legal standing calls for is difficult to attain. Yet it is essential in order to arrive at a valid verdict, which is indispensable, in turn, if we are to deprive any individual of his or her autonomy or life. Claims that the procedural requirements have not been met satisfactorily must be able to be raised in the trial court and brought again in front of an appeals court that is independent of the trial court.

The procedures I have described may appear almost self-evident today, yet it took a very long time for the nation to make a start at honoring them in the cases of most accused individuals. Only during the past century at the federal level and just during the *past half century* in the states and cities have governments been required to accord the simplest rights of equal standing, whether it be the right to a lawyer (provided through public funds when necessary), the right to a jury pool that represents a fair cross section of the community, or the

right to learn of exculpatory evidence uncovered by the prosecution. All those rights were denied defendants in many places around the nation prior to the 1950s and 1960s. It was not until the past century, either, that judges began routinely to require the exclusion of evidence from trial that the prosecution had gathered in contravention of the rights of the accused in the Constitution. Important as all of these steps are, though, they remain but a start, as will become clear in the next chapter. We have a considerable distance to travel in order to claim, in truth, that defendants in criminal cases receive the full and fair trial that is necessary to equal legal standing and thus necessary to individual freedom itself.

Those kinds of issues, relating to criminal cases that ordinarily concern violent and property crimes, typically strike at individuals of low and moderate income, but they by no means end there. Issues of equal standing extend as well to higher-income individuals and large corporations in civil cases. They do so, for example, when they involve questions of jury bias and costs of litigation so substantial that even parties who are innocent settle, in effect forced to acknowledge guilt, in order to avoid facing still far larger legal expenses or the possibility of jury bias that they would otherwise have to bear.

Conclusion

The moral principles of individual liberty require that we each have equal standing in the political and the legal processes by which the collective society makes decisions affecting our liberty and our lives. Equal political and legal standing, in turn, call upon us to honor a wide range of obligations to one another. An advertisement some years ago became memorable with the saying "We've come a long way, baby." From where we started with respect to equal standing, whether political or legal, we have indeed come a long way. We have not reached the destination, however, not by any means. Genuine freedom is a demanding ethic, which is what allows it to be morally defensible. Basic violations remain with regard to not only equal political and legal standing but also other areas vital to make freedom genuine. Together they cause tens of millions of Americans to suffer every day, in fact the average American. We have embarked on a noble and historic voyage as a nation, but we have not yet arrived. There are still many fundamental steps left to take.

CHAPTER NINE

Taking Freedom Seriously

We claim with deep pride, as Americans, to be "the land of the free." That vision of ourselves as a nation represents our core identity, the value we declare to the world, and it has done so since the beginning.

How far have we come toward being that land we profess? What do the foregoing pages have to teach us about who we are and about how history will come to regard us in the future? Few questions are more fundamental. Questions we ask about our morality, to turn to philosopher Michael Walzer again, reach down to the very heart of our way of life and put that way of life at issue. For that reason, though, we have much to learn from the answers. One common approach to addressing such questions is to look to the perspective of history, to ask how conditions in the nation today having to do with individual freedom compare with those at some other period of time in the past. Have conditions improved over the years or not? This perspective takes a "relativist" view. Another perspective, an absolutist one, reaches higher. It asks how closely we come as a nation to actually honoring the principles of freedom and the obligations we owe one another under those principles. Examined from *either* of these perspectives today, the answers are most unsettling.

A Relativist View

That conclusion may seem surprising in light of the unquestioned progress the nation has made since its birth. Think back to the start. The Founders described the nation then as "the beacon of freedom," the "workshop of liberty." Yet in key respects that was a bald untruth, surely as compared with the situation that exists today. It is not simply that slavery held sway in half of the states, with indentured servitude spreading much further. Or that American Indians were physically forced off of their land. Or that property requirements for the franchise existed in nearly every state, religious requirements in some, and that persons of color were excluded in many places, women everywhere. Later, even following the defeat and elimination of slavery, more than half of all adult citizens still had no vote. All of this has now changed.

Only one century ago, states and localities could deny any citizen freedom of conscience and religion if they decided to do so. Evidence gained unconstitutionally could be used in trials, and the accused had no right to a representative jury or to an attorney unless he or she could personally afford one. For one hundred years following the abolition of slavery, legally enforceable segregation continued to separate the races over broad stretches of the nation. All of this, too, has changed.

At the time Upton Sinclair wrote *The Jungle,* in the early twentieth century, there was no longer an open frontier to provide hope for a better life or major public interventions to combat wholesale shortages of economic opportunity and widespread, oppressive poverty among Americans who worked sixty hours a week, let alone those who were unemployed. Only very rudimentary regulation existed to deal with the most basic wrongful harms regarding safety, health, and life in the marketplace. This has changed, as well.

A comparison of where we are today with the situation that existed at the time of the nation's founding, or indeed a century ago, or still less, shows that we have taken immense strides toward overcoming and reversing fundamental violations of the morality of individual liberty, genuine liberty, liberty that is morally sound. Many of the steps were difficult ones, involving prolonged and bitter battles that required every measure of devotion and commitment for freedom to move forward. The degree of advance has been remarkable, worthy of high admiration. Yet dark clouds have formed and settled in. Looking back, one finds that barely any headway has occurred for quite a while now. Virtually every one of the steps just mentioned, for example, was set in motion and

largely put into place by the early 1970s or before, some thirty or more years ago. Since then, the pace of progress has slowed acutely, coming to a firm halt in most areas. Perhaps that is because we have traveled so far toward freedom as a nation that after all these years little room remains for further progress. Perhaps, by now, we have practically reached the destination. This explanation would offer comfort, but it would be untrue.

An Absolutist View with a Relativist Ending

Breaches of the principles necessary to the moral power of freedom, principles that make individual freedom genuine, are widespread in our nation. They affect the lives of most Americans. However, while that state of affairs is serious and demands our attention, it alone in no way condemns us as compared with our forebears. After all, huge gaps between the ideal and the reality have marked our whole history. What distinguishes the present is that, despite the many remaining discrepancies, advances have decelerated in most areas to a standstill. We are actually reversing course in key respects. A nation can be faithful to individual liberty either by honoring its principles or, relatively, by attempting to advance toward them. To do neither despite the continued existence of enormous transgressions fails to take freedom seriously.

Incursions into individual liberty today deprive a significant fraction of American households of the opportunity to attain a minimally decent standard of living through work. They then rob average families—more than half of all American families—of a veritable fortune that is legitimately theirs based upon their improved work. Ultimately, the violations result in treating tens of thousands of fellow citizens in a manner equivalent to slavery right here at home. Those are not the only violations, by any means. The offenses that we have tolerated and done little to address, for more than a generation now, make up a long, disturbing list.

In what follows, I concentrate on the most egregious breaches. They impact the greatest overall numbers of Americans or have the greatest severity of effect on individual Americans. Still others are identified in prior chapters.[1] In the final section of this chapter, I take up solutions that enable us to recover our momentum, resume the nation's historical journey toward freedom, and regain the thrill of progress.

Economic Opportunity

The promise of the American Dream holds that there is enough economic opportunity for all hardworking, responsible, and persevering individuals to

make a decent living and get ahead. That idea runs deep in the American mentality. And as well it should. The same principle is required in order for a regime of private property surely to leave "enough and as good" for all individuals, which is necessary for individual liberty to rest on a solid moral foundation.[2] To remain morally sustainable within its own reasoning, liberty requires that every able individual have sufficient opportunity to attain a dignified living standard through work and be able to get ahead through improved work.[3] So it should come as no surprise that this same ethic would lie at the heart of the American Dream or that it would have such extraordinary resonance in a nation that identifies so deeply with individual liberty. It should be no surprise, either, that the same ethic would connect us with our beginnings and echo the vision of individual freedom that inspired the Founders, and our birthing documents, from the very start.[4]

Mere presumption that the forces of the free market naturally create the kind and level of economic opportunity that liberty requires, or that the upward mobility of some Americans provides the proof of it, treats the issue with little more than lip service. Presumption and individual example fall short. Liberty and the economic opportunity it promises are to be for all, not contingent so that enough exists for some but not for everyone or nearly everyone.

As I write, the nation faces an immense shortage of economic opportunity. Just at the tip of the iceberg of problems, more than 25 million American workers are unemployed, hold a part-time job because they cannot find full-time work, or occupy year-round full-time jobs paying an inadequate wage unable to support a socially decent standard of living despite full-time work.[5] Only a relatively small number of them are school dropouts. Many more of these distressed workers not only have earned high school degrees but have completed some postsecondary education. The shortage of decent employment opportunities for them is not just peculiar to down cycles in the economy, either. It is a longstanding problem. Much the same scarcity existed at the *height* of the past recovery in 1999, at the very top of the recovery before that in 1989, and the one before that, too, in 1979.[6] The scarcity had been in the process of building since the 1950s.[7]

In the context of this reality of scarce opportunity, the reform of welfare in 1996 led to a sharp reduction in caseloads, but the reform could never have been realistically expected to enable most former recipients to reach the intended poverty line through work, or in many cases even the official poverty line. Predictably, it didn't.[8] Relatively few former recipients succeeded in this respect. What is more, the reformers seemingly didn't care. (Testimony to their

disinterest is that the legislation never called for measuring the success or failure of the reform in this regard.)

Moreover, former welfare recipients were far from alone. To the contrary, about five times as many Americans in the labor force who were not on welfare had no better success in reaching a minimally adequate wage.[9] Again, included among them were millions of steady workers who had been employed continuously for a decade or longer and also many who had completed some post-secondary education.[10] Like those formerly on welfare, they found themselves unable to move out of low-paying jobs.

The shortage of decent opportunity grows still worse when we add to it the lack of health insurance coverage for many low- and moderate-wage workers through their jobs. A majority of individuals without health coverage are either employed or in the families of employed workers. Then, to rub salt in the wound, the nation fails to assure many children living in low-income areas anything that approaches a satisfactory basic education. In international tests, they score among the very lowest when compared with children from other nations, lower indeed than those from third-world countries. That is not the case for the remainder of American students, who average from the median to among the highest-scoring nations.[11] Increasingly, too, undergraduate education is growing out of the reach of low-income families, indeed, today, also middle-income families.

That, as I say, describes only the tip of the iceberg. It just skims the surface if the standard that makes individual liberty morally sustainable is our guide. What affects a sizable fraction of American workers spreads to a majority in the stunted opportunity many individuals have had to be able to improve their living by improving their work, that is, the right of free individuals to receive the fruits of their labor. With earnings growth going increasingly to those at the very top over the past three decades, the real wage of the median American worker stagnated. The median worker is the one who occupies the exact middle position. The real hourly compensation for that worker changed only marginally over the entire period, *despite more than a 50 percent overall improvement in workers' productivity.*[12] This is to say that a large number of American workers lost their freedom to build a better life, even if they improved their work, as the compensation flowed instead almost entirely to the very affluent.[13]

Expressed in dollars, as I showed in Chapter 3, the growing disparity in compensation relative to productivity now surpasses $13,000 per year for an average American working family with two workers[14]—a cumulative gap over

the three decades that amounts to more than $150,000 per family in today's dollars. That total grows larger each year. It is tempting to think that intensifying global competition from low-wage countries lies behind the median American worker's faltering compensation. By this account, wages had to lag in order to keep the prices of our goods competitive in global markets. Yet, as we have seen in Chapter 3, overall compensation in the United States did keep up with the growth of workers' productivity. There was no loss of compensation, only a massive upward distribution of it that cannot be explained successfully by education or skill levels and that failed to occur to the same degree, or at all, in most other advanced industrial nations.

On top of it, the reduced proportion of taxes paid by corporations and high-income individuals over the period (relative to their greatly enlarged share of total income) has added another $1,000 in taxes per year onto the cost for the average American household,[15] relative to its reduced share of income. Consequently, a typical working family is now about $14,000 annually below the overall level of compensation and spending income that would align with the improved productivity of workers in those years, from 1973 to 2003.

Families could do a lot with that kind of money. It is more than enough to finance a home, a car, college for the kids, savings for retirement or emergencies, and other major family needs. From the perspective of the wealth of a typical American family, it represents a genuine fortune. Its accumulated size is fully double the median net worth of the American family today.[16] In the absence of the opportunity to move ahead through improved labor, Americans instead have lengthened their hours at work, leaving them at once more exhausted, under greater stress, and with less time available to spend on family life and their children. They have also gone into greater debt and reduced their savings. Together husbands and wives, fathers and mothers, now work an average of 660 more hours per year than they did in 1979, an additiona1 16 full workweeks over the year between them.[17] The real income of American families inched forward as a result, but hardly enough to match their lengthened work hours and expenses related to work, let alone keep pace with any improvement in their work.[18]

In addition to these many problems stands still another issue. That issue has to do with unequal access, based upon factors such as gender and race, to the paltry opportunity that does exist.

Forty years ago, a series of landmark civil rights reforms outlawed discrimination by race and gender in the employment, housing, and consumer mar-

kets. Though moderating over the years and taking a less overt form, discrimination nonetheless persists. In 1997, more than three decades after the great reforms, the average hourly wage of black males who held a college degree was $16.53; the pay for white males with a college degree stood 30 percent higher, at $21.45 per hour.[19] The gap was about as great (24 percent) between black and white males with a high school education. Similarly, the average wage for a female worker with a college degree who had sixteen to twenty years of work experience was $17.84 per hour; the wage for a male worker with those very same qualifications was 32 percent higher—$23.53.[20]

Pay differentials arise from many complicated factors. However, it is difficult to conclude that legitimate factors apart from the level of education and years of work experience could explain gaps in pay as large as 25 and 35 percent. And those gaps say nothing about the vast disparities of wealth that currently exist between the races, whose origins lie at least partly in centuries of slavery and segregation as well as land forcibly taken from millions of individuals, all in violation of liberty.

Today, even the use of common black and Anglo first names on otherwise similar résumés submitted for jobs elicits significantly different responses from employers.[21] Everyday occurrences of that kind influence the jobs and wages individuals receive. Whether subconscious or overt, discrimination based upon race and gender undeniably continues to affect economic relations. The wage discrepancy between males and females has narrowed somewhat over the past several decades, despite remaining larger in the United States than in many other major economies.[22] The differential has moderated to a degree for whites relative to minorities, as well, though the wide gap in unemployment rates has changed barely at all.[23] Racial differences in the quality of schooling available also continue to have a debilitating effect on wages.[24] We must keep in mind, once again, that these enduring differences based on race and gender occur *on top of* general shortages of economic opportunities that strike everyone—males as well as females and whites as well as blacks, Hispanics, and other minorities.

By the standards of individual freedom, those general shortages in economic opportunity are deep seated and far reaching. They have a powerful impact on the lives of individuals and families, both for the few and for the many. Given their magnitude, what stands out is the meager action taken over the past three decades to overcome them. Yes, the minimum wage has been lifted from time to time, and the Earned Income Tax Credit has grown significantly. Yes, health care coverage is available now to many children under age fifteen in otherwise

uncovered families, and the costs of prescription drugs have gained some coverage under Medicare. Yes, the nation has adopted, as a matter of policy, the principle of leaving no child behind in education. Public education now also serves children with disabilities far more effectively.

Yet, generally, such steps have led merely to softening continuing declines in opportunity rather than reversing, let alone eliminating, them. Recall, for example, that an adequate wage is the lowest pay it takes to support the bottom level of a recognizably American way of life.[25] In 1950, the minimum wage stood at 100 percent of an adequate wage, wholly matching it.[26] By 1965, it had fallen to about 90 percent. Between 1950 and 1965, also, the total number of jobs fell significantly relative to nonretired households and second earners needing employment.[27] Despite adjustments over the years since then, the minimum wage has been allowed to decline so substantially further that today it comes to barely 55 percent of an adequate wage.[28]

Even adding in the sharply increased Earned Income Tax Credit and food stamps to the pay of two workers enables today's minimum wage to reach barely 70 percent of the income of a minimally adequate budget for a family of four.[29] That still leaves a sizable gap of about $9,100 annually—a gap 90 percent as great as the minimum wage itself (which is $10,300 annually) in contrast to the absence of *any* gap in 1950. In 2001, about one-quarter of all American workers, representing nearly all educational backgrounds, were in jobs with pay that fell between the minimum wage and an adequate wage. It is true that public policy also began to cover the basic health care needs of more children under age fifteen over the past two decades and pharmaceuticals gained some coverage for the elderly. At the same time, rising numbers of households lost health care coverage through their jobs. As a result, more adults as well as more children above age fourteen, together representing a larger proportion of the public, now lack insurance.

Moreover, actually leaving no child behind educationally requires resources in excess of the modest amounts that have been appropriated. Funds remain significantly less than those called for in the authorizing bill that President Bush signed,[30] which themselves are likely inadequate. So sparing is the available support that some states have insufficient resources even to evaluate (let alone carry out) the improvement plans required from schools measured as underperforming.[31] Faced with budgetary crises, many states have been cutting back their own educational financing instead of increasing it, and some have reduced the standards themselves.

The story does not end there. Thirty, forty, and fifty years ago no disparity at all existed between overall productivity improvements of workers and the aggregate wage increases that average workers received. From 1945 to 1973, workers' real compensation increased in tandem with overall productivity gains of the labor force. Since then that relationship has all but disappeared in the United States, unlike in a number of other nations. It has been allowed to dissipate, for thirty years now, at immense cost to the average American family. Back then, as well, public policy restricted legal immigration to about one-third the subsequent annual intakes and so helped to control the oversupply of labor. Workers also had more protection in attempting to organize their places of work, which helped to shore up wages. In addition, linking Social Security benefits to inflation a generation ago had the effect of lowering those benefits relative to the general standard of living—the same consequence that freezing the official poverty line a generation earlier had for measuring income inadequacy. Whether we focus on minimally adequate opportunity or the ability to get ahead through improved work, or instead look at Americans during their working years or when retired, wholesale problems exist. The nation has made little headway over the past thirty years, in any of those areas, toward honoring the general obligations of opportunity necessary to satisfy moral principles of individual liberty. In fundamental respects we are now further away.

Even regarding the impact of discrimination, the area receiving the nation's most rapt, prolonged attention, we can fairly describe the record over the past generation as no better than mixed.[32] During an age with scant opportunity for most workers and families, that result may be understandable. Nonetheless, a patchy record with little hope for much further improvement remains unacceptable in a nation having individual freedom at the heart of its identity and professed highest moral aim.

James Madison, who worried mightily about the safety of property, believed that protection was best achieved within a society when the greatest number of citizens had a way to provide a decent living for themselves and their families.[33] In such a society, Madison thought, individuals would be more likely to respect the rights of others. The safety of citizens from violent and property crime is an important dimension of freedom, one that Madison not only considered vital but also saw as closely connected to economic opportunity and condition.

Over the past half century, the incidence of crime has changed dramatically in the United States. It rose modestly in the 1950s and then began to skyrocket from the early 1960s forward as the mushrooming baby boom generation

reached the ages of fourteen to twenty-four, the prime crime years. The same baby boom bulge helped create increasing shortages of economic opportunity. The proportion of baby boomers at prime crime age reached its zenith in the early 1970s and continued at that same level until the early 1980s. Partly as a result, by the early 1970s crime rates had doubled. Yet rates of both violent and property crime then failed to steady during the decade of the 1970s to reflect the constant baby boom contingent passing through; nor did they begin to drop after the 1980s, once that enormous generation started passing beyond the prime crime years. Instead, rates of both violent and property crime only grew worse until 1980 and then remained at their record levels until the early 1990s.[34] That crime rates failed to follow demographic trends so as to level off in the 1970s and diminish in the 1980s remains consistent with the substantial shortage of basic economic opportunity that existed throughout the period, a shortage that indeed grew worse in the 1980s.[35]

The trajectory of declining crime that demographic changes should have brought in the 1980s began to take effect only following the early 1990s. Measured by levels of crime, the nation has become significantly safer—and in this important regard a freer place—over the past decade. Commencing in the early 1990s, crime rates have fallen year after successive year. Perhaps the strengthening of criminal laws and law enforcement beginning in the late 1960s, which had sharply increased levels of incarceration by the late 1970s and early 1980s, finally kicked in. Perhaps improvements in economic opportunity starting in 1993 or 1994 and continuing through the decade's close have helped.[36] Still, on the economic side, and despite the progress from 1993 to the end of the recovery, the shortage of basic economic opportunity remained substantial, falling no further than the relatively high level it had attained two decades earlier.[37] In this respect, it is important to note that as much as rates of crime have receded, they have failed to decline below the elevated heights they had reached already by the early 1970s, levels that greatly alarmed most Americans at the time. That is, just as serious shortages of economic opportunity continue, so have rates of crime relative to the demographic profile of the population stayed very high. They remain dramatically higher than they were prior to three decades ago, when the demographic profile was similar to what it is today, in the 1950s and early 1960s.[38]

Whatever role the scarcity of economic opportunity plays with respect to the incidence of crime, we should not lose sight of the bottom line. Shortages of opportunity of the magnitude described here and in earlier chapters run coun-

ter to obligations we have that are critical to the underlying morality of freedom. Honoring them is necessary in order for freedom to follow clearly from the method of reasoning and vision of thinking about freedom that inspired the nation's birth. The shortages of opportunity acutely affect the lives of a majority of Americans and do so on many levels. Yet these shortages have been tolerated, allowed to continue largely unabated for decades, and in key areas have been permitted to worsen.

Equal Standing before the Law

For the word *slave, Merriam Webster's Collegiate Dictionary* offers the definition "one that is completely subservient to a dominating influence."[39] Slavery involves the wholesale violation of an individual person's autonomy, reducing that person to total subservience to another.

In virtually all cases that fall under the criminal law, an individual's personal autonomy hangs in the balance, at times his or her very life. In forfeiting his or her liberty, an individual who is imprisoned enters into a condition equivalent to enslavement, or certainly a close cousin to it, an obviously intolerable situation morally from the standpoint of liberty if that individual is innocent. For this reason, a verdict to deprive an individual of his or her physical liberty or life can begin to be made compatible with the morality of individual liberty only if there is compelling reason to believe it true that the individual is guilty. Compelling reason can exist only if the accused has had a full and fair opportunity to present a defense on a plane qualitatively equal to that of the prosecution.

The Supreme Court ruled in 1963 that all individuals accused of felonies, whether at the federal or state level, have a right of access to an attorney, including one provided at public expense if the defendant cannot afford one.[40] This right applies not only to the trial itself but to the first appeal of any conviction.[41] Elsewhere, the Court has tried to assure that jury rolls for trials reflect a fair composition of the citizenry, that evidence obtained illegally by the prosecution does not prejudice the outcome of a trial, and that the defendant has timely access to evidence gathered by the prosecution. Basic steps in each of those directions occurred during the period between approximately 1920 and 1975, each of them in the name of creating standards that meet the most elementary criteria for a full and fair trial.

Important as those steps are, however, they contain serious shortcomings. According to the Court, the right to an attorney does not exist during the investigative stage before indictment, not necessarily even when an individual

is required to participate in a lineup.[42] Furthermore, the right to an attorney does not apply beyond the first appeal of a conviction.[43] After the first appeal, the presumption exists that the appellate courts can and will provide the defendant with adequate protection based upon the prior record from the original trial and the first appeal. If an indigent defendant wishes to raise new issues after the first appeal, therefore, he or she will likely have to develop those issues and present them on his or her own without the assistance of an attorney. This is the case even if the defendant wishes to raise the very issue of the competence of his or her counsel during the original trial or the first appeal.

Those various limitations, though, pale in importance when compared with another limitation relating to the very question of what constitutes competent counsel. The Court has properly ruled that the right to an attorney is a right not simply to any attorney; it is the right to "effective assistance of counsel." Only with such counsel can the defendant gain the opportunity to present a defense on a plane qualitatively equal to that of the prosecution. Forty years ago, in 1963, Abe Krash assisted Clarence Gideon in the landmark case establishing the constitutional right to counsel. Krash recently observed: "It is simply not sufficient to say you're entitled to a lawyer. You have to have a lawyer that is competent and experienced in trying criminal cases. Equally important, the lawyer who is appointed has to have the resources available to adequately defend the case."[44]

Yet the Court has established no reliable minimum standard to determine the meaning of "effective assistance." In individual past cases, the Court ruled that effective counsel had been provided by an attorney who had barely spoken with the defendant; one who had never before worked on a criminal case; another who had tried the case while taking heroin and cocaine; still another who had acknowledged that he was unprepared for the case; and, finally, an attorney who testified that he knew nothing about the law involved in the case.[45]

To gain relief, in practice, a defendant must show that a reasonable probability exists that the ineffectiveness of the counsel assisting him or her exerted a substantive influence on the trial or the jury. By its very nature, though, the issue of whether a trial or jury might have been affected had the defendant's counsel been more effective is highly speculative. Quite often there is no hard evidence as to what would have happened had the lawyer done a more capable job of jury selection, or raised certain lines of inquiry, or had closer communication with the defendant or other witnesses, or had better negotiating skills. Yet

the burden of proof lies with the defendant to demonstrate a reasonable probability that counsel's ineffectiveness had a substantive impact on the trial. Given this burden of proof on what at its core is a speculative question, it is little wonder that defendants with attorneys who acknowledged that they were unprepared for the case, who were on heroin, who had no prior experience in criminal trials, or who fell asleep during the trial were found by the Court to have had "effective assistance of counsel."

The presumption of liberty is that individuals will be condemned to prison or death based upon the truth. The adversarial process as a method to find the truth assumes that there are meaningful adversaries of relatively equal effectiveness. "Effective counsel" needs to be defined so as to refer to an attorney whose quality and compensation are reasonably comparable to the quality and compensation of an individual attorney normally available to the prosecution, with access to resources reasonably equal to those of the prosecution. Similarly, it should be defined in such manner as to be consistent with the American Bar Association's Rules of Professional Conduct.

A majority of all defendants who are brought to trial on criminal charges come from low-income backgrounds and so are unable to afford counsel. The results of those trials are thrown into serious question when the assistance of attorneys provided such defendants is allowed to fall well below the counsel available to the prosecution in quality, compensation, and resources. In 2000, the *Chicago Tribune* published a study of the death penalty cases that took place during George W. Bush's years in office as governor of Texas. There were 131 cases in all. Among other things, according to the study, those 131 cases involved 43 defense attorneys who were either sanctioned or disbarred before or after the case and 29 cases that relied on testimony from psychiatrists who were considered unethical or unreliable by the American Psychiatric Association.[46] A study of criminal cases in New York found that more than 90 percent of court-appointed attorneys did not file a single discovery motion. Eighty percent had never even interviewed their clients.[47]

In addition, compensation is often egregiously low for appointed defense counsel. In some capital trials, the court-appointed attorney is paid less than nearly anyone else working for the court.[48] In 1998 in Kentucky, the maximum fee for a court-appointed attorney in capital cases was $2,500. At the median number of hours attorneys spend on a capital case,[49] this fee amounted to about $5.50 per hour, just barely the minimum wage at the time.

The implications of the failure to provide adequate counsel in criminal cases

for the validity of the results of trials, and hence for individual liberty, are fundamental. In 2003, Ray Krone of Arizona had a dubious honor. He became the one hundreth person wrongfully convicted of murder and released from death row during the past three decades. He had been convicted of murdering a bartender in Phoenix. He and each of the other ninety-nine defendants were declared innocent of the crime, and their convictions were overturned. Those one hundred defendants amounted to about 1.5 percent of all individuals given a death sentence in those years. Like Ray Krone, the individuals condemned to death whose convictions were overturned had been behind bars for a period averaging nearly *ten* years before the errors were discovered.[50] An investigation in Illinois found that "capital punishment . . . is so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence that justice has been forsaken."[51] Whereas twelve convicts were executed from 1976 to 1999 in Illinois, thirteen who had been condemned to death had their convictions overturned and were freed from prison in the period after 1987 alone. Following those disturbing developments, Illinois governor George Ryan announced a suspension of executions in that state. Three years earlier, the American Bar Association asked for a suspension across the nation. A number of other states have appointed commissions to examine capital punishment. Evidence suggests that the condition of justice concerning trials of capital offenses in Illinois, Texas, and New York is descriptive of capital cases in many places around the nation.[52]

Suppose the minimum 1.5 percent error rate *known so far* for capital cases were to be true for criminal convictions more generally. If so, then at least thirty thousand Americans are confined to prisons or jails today who are actually innocent of the crime, fifty of them presently on death row. Given current standards for appraising an effective defense, we have no compelling reason within the morality of liberty to believe that those thirty thousand imprisoned individuals, and possibly many more like them, are in fact guilty. That number of plausibly innocent Americans who are behind bars, completely stripped of their freedom, doubles or triples all Americans ever ensnared in terrorist atrocities against the United States over the past half century, across the globe, up to and including September 11. We should not treat the number lightly, or a number anywhere close to it, not if individual liberty is our highest aim.

Prior to indictments and trial plenty of other problems occur, too. Widespread police misconduct concentrated in minority and poor neighborhoods has been documented in city after city in the United States. At the start of the

1990s in Los Angeles, a survey of more than six hundred police officers discovered that many of the officers themselves believed that racial bias prevailed among officers in a manner affecting the way they carried out their duties.[53] This was at the time of the videotaped brutal police beating of Rodney King. So the scandal that rocked the Los Angeles Police Department a decade later, in 2000, should have been no surprise. A criminal investigation leveled charges that large numbers of police officers were tampering with evidence, intimidating witnesses to give false testimony, and committing perjury and assault. The investigation produced evidence questioning scores of criminal convictions. In 1994, the Mollen Commission learned that police corruption, intimidation, and brutality existed in most low-income and minority neighborhoods of the Bronx in New York City. Investigations in Boston and Philadelphia found a similar pattern of police behavior. In Des Moines, a case in federal court demonstrated that *only* minorities were arrested for certain infractions, despite the likelihood that a clear majority of the violators were whites.[54] In various places around the nation, traffic stops on roads and highways by police to search for alcohol or drugs target minorities at rates many times greater than those for whites relative to the actual commission of violations.

Problems of equal standing before the law are by no means confined to minorities or the poor, either. Individuals and businesses wrongly accused in civil suits yet unable to afford to defend themselves—or when it becomes uneconomic for them given the steep court expenses or possible jury bias against them—often settle instead even though the evidence is in their favor. Our judicial system subjects them, in effect, to a form of legal extortion.[55]

The problems I have described represent significant breaches of the morality of individual freedom. With respect to the right to a full and fair trial against criminal charges prior to verdicts that can impose imprisonment—the most sweeping loss of freedom—a succession of vital steps bringing significant progress took place across the twentieth century, up until a few decades ago. Over the past thirty years, by contrast, that progress has stalled. Little further advance has occurred in this area or toward surmounting the other issues having to do with equal standing before the law.

Finally, all of us depend upon the impartiality of the courts. Fulfillment of this most basic element of a full and fair hearing becomes questionable for each and every one of us—whether it concerns criminal, civil, or constitutional issues—to the extent that judges themselves are selected because of the strong personal political and policy biases they have and with the hope, expectation,

and result that those biases will influence how they respond to litigants' arguments and evidence in their judicial rulings. Although greater numbers of states and localities have moved toward some form of merit selection of judges over the past three decades, that is not so at the federal level, as Chapter 8 pointed out. There, if anything, judicial selection has grown increasingly political with the passage of time.

Some might say that one area in which freedom has been able to advance over the past several decades concerns the reduction of crime itself. The incidence of violent and property crime nationally rose enormously from 1960 to 1990, as we have seen,[56] representing a real blow to freedom. Those rates have declined appreciably in the past decade, returning to levels of the early 1970s. At the same time, they have not fallen below those levels—that is, they have not returned to the lower rates that existed in the early 1960s or 1950s (which were high even then by international standards)—let alone improve upon those rates. Crime rates remain substantially higher today than forty or fifty years ago, unhappily, and significantly higher even than in the early 1970s when compared with the demographic profile of the nation's population.

Equal Political Standing

A necessary condition for coercive policies of government to remain compatible with an individual's liberty is for each individual to have reasonably equal standing in the making of those policies. Unless variations in influence serve the end of making more informed or more representative decisions, no individual should carry significantly more weight than other individuals in the decisions that we all must obey. For it to be contrary leaves those individuals with diminished weight forced to obey the laws of others whose political weight arbitrarily exceeds their own. For reasons presented in Chapter 8, donations of large amounts of money to political candidates and causes run counter to the principle of equal political standing in a way that no other political resource does.[57] Every individual of ordinary means experiences a lessening of his or her liberty to the degree that the processes of government result in giving a disproportionate hearing and response to individuals making large donations of money, including when large donations to one's own candidacy or political cause foster that same result.

The McCain-Feingold campaign finance reforms of 2002 placed regulations on "soft-money" donations given to national political parties and so-called independent campaigns supporting individual federal candidates. However,

that same reform left the self-financing of a candidate's own campaign, the financing of separate campaigns until near an election or perhaps even then, and the financing of independent political causes either largely untouched or unclearly regulated. As I write, individual large donors are contributing millions of dollars to issue groups, called 527s, whose aims are to influence election results at the federal level. Nor, obviously, do the reforms cover the fundamentals of financing campaigns for candidates, initiatives, and referenda at the state and local levels, levels at which present regulations are highly uneven, at times nonexistent.

From the vantage point of equal political standing, the vote itself does not yet have an equal weight for each American. We live under electoral procedures that at key points follow principles of federalism rather than freedom. The United States Senate magnifies the votes of some citizens as compared with others, by as much as seventy times. The distribution of governmental funding relative to taxes is substantially more unequal when representation is unequal, as was routinely the case at the state and local levels until corrected four decades ago[58] and remains the case for the Senate at the federal level today. For citizens of the ten largest underrepresented states in the Senate, the discrepancy between funding received and taxes paid amounts to about $600 annually per person in the negative, about $2,500 for a family of four. The reverse is the case for the overrepresented states. Not all of this discrepancy is due to misrepresentation, but surely an important part of it is.[59] On top of unequal representation in the Senate, we elected through the Electoral College in 2000 a president who failed to gain a plurality of citizens' votes. He went on to pursue a range of actions that profoundly influenced final policies and decisions, which we all equally must live by, without ever having attained the most elemental legitimizing step under principles of individual freedom—gaining more votes from citizens than did the opposing candidate. It is unclear that he ever tempered the policy agenda he took up in any way in deference to this departure from one of the most basic canons of freedom.

That proponents of laws to regulate financial contributions for political purposes defend their proposals today on grounds of the possible corruption of officials rather than equal political standing—along with the fact that only a murmur rather than an outrage followed the 2000 election, with barely any call to change the electoral college—suggests the shallow roots that the principle of equal political standing now has in the United States. By contrast, that was not the case forty and fifty years ago when the move took place to apply an equal

vote to elections for state and local offices and to the federal House of Representatives. Nor was it the case thirty years ago when the major campaign finance reform that Congress adopted, to tackle issues of Watergate, attempted to place restrictions on election campaigns grounded in the tenets of political equality and not solely the possibility of corruption. Over the past few decades, the principle of equal political standing has lost considerable ground, virtually disappearing as a concern. It has morphed into a focus on the far narrower question of corruption as the issue we appear to care about.

Policy Solutions

For some time now progress in addressing conditions of scarce economic opportunity, unequal standing before the law, and unequal political standing can be described as fairly slim despite the size of the problem in each of those areas. It's not that we lack for practical solutions to most of the problems. When thinking about economic opportunity, for example, it takes little imagination to figure out effective steps able to attack and reverse nearly all of the scarcities, which makes the relative inaction of the past three decades all the more disturbing.

The economy now is practically three times larger in real terms than it was thirty years ago. President George W. Bush himself observed, "Our economy has grown 164 percent in three decades. That's pretty good growth."[60] Despite this growth, serious shortages of economic opportunity remain that stand in conflict with individual freedom in ways affecting more than half of all Americans. In crucial ways the shortages have become worse. The so-called trickle-down effects of the economy's nearly threefold expansion have failed to do the job. We have seen that substantially greater economic growth continuing for a prolonged period, hypothesized from cutbacks in governmental spending and taxing, would leave the shortages mostly intact, even if the growth materialized.[61] Economic expansion alone is an inadequate answer. That is not surprising, since the theory of the market economy has efficiency at its focus rather than opportunity as understood within the morality of individual liberty.

To fashion opportunity appropriate to liberty, solutions require greater governmental involvement and expenditures coupled with continued economic growth. The measures needed from government include raising the minimum wage modestly[62] and the Earned Income Tax Credit significantly; assuring adequate health care coverage for every working family (ultimately, for reasons shown in Chapter 6, universal single-payer health coverage with secondary

private insurance will be the only feasible solution here); properly funding education in low-income locales, along with applying standards, and expanding postsecondary aid so that it meaningfully assists middle-income as well as low-income families; augmenting support for child day care; extending unemployment benefits consonant with job scarcity, adding health care coverage to the benefits, and broadening benefits to cover a larger proportion of unemployed workers; strengthening regulations to encourage and make collective bargaining more effective along with enforcing both those regulations and civil rights laws more vigorously;[63] expanding workforce development and retraining; modulating legal immigration intakes to the labor supply available at living wages; targeting subsidies to reduce the relocation of jobs to low-wage nations; and recasting the poverty line so that it measures the borderline of a minimally decent standard of living today rather than that from a half century ago. The steps also require raising Social Security at the bottom to align with the recast poverty line, supplementing the prescription benefit, and adding long-term care assistance to Medicare.

The combination of those actions will take long strides toward alleviating all the existing shortages of economic opportunity.[64] By effectively raising low wages, the actions will resolve issues of minimally adequate opportunity for workers now employed year-round and full-time at pay below an adequate wage, more than 10 million of them. They also will attack the gap between lagging wages and improved work that confronts much of the rest of the labor force today. Greatly enlarging the Earned Income Tax Credit will extend the credit to and lift the earnings of a far broader range of families than does present policy. Those assisted will now include not only lower- but middle-income quintiles of families, whose productivity improvements also went largely unrewarded over the recent past. Strengthened employee associations and collective bargaining, along with stronger enforcement of civil rights regulations, will help the private market raise wages for average workers more closely in line with productivity as well. They will also lessen inequalities of opportunity inimical to freedom, as will bolstering the quality of education in low-income locales. Additional support for both low- and middle-income households will come in the form of added health care coverage for workers and their families along with expanded financial assistance for children in postsecondary education. These same actions contribute in another way, too. They will create larger numbers of full-time jobs offering adequate compensation that can be filled by more than 4 million workers now employed part-time because they have been unable to locate satisfactory full-time work.

Taken together, the measures spearhead a program—actually, a compact—to protect and advance economic freedom. Such a program commits to treat the work of each American as individual freedom morally requires. It honors the fundamental principle of freedom, necessary to its moral power, that all individuals have sufficient opportunity to provide a dignified living through work and receive a decent return from their improved work. It places the work of each American back at the heart of national life and the promise of the American Dream, as freedom intends, rather than remaining the uncertain trickle-down afterthought of private market outcomes that it has become today.

The measures are not free, of course. Few actions necessary to protect and assure freedom are free. However, revenues for the measures appear to be well within our ability. In combination, the measures require about $280 billion per year in net increased governmental spending,[65] below 3 percent of the GNP.[66] Four actions alone can produce that much revenue: placing a 5 percent surcharge on the taxable income of households with annual incomes exceeding $200,000 (that is, the top 3 percent, where the vast bulk of increased incomes from the free market have ended up); taxing offshore corporations currently evading taxation; ending tax exemptions of companies' pension contributions beyond a defined upper limit; and enforcing the present tax code to assure payment of taxes owed. Those four steps would yield up to $300 billion in revenues or more annually.[67]

Yet all the while we lower taxes instead. And we do so disproportionately to the advantage of the most affluent, whose incomes the private economy has already generously benefited—CEOs now receive 250 times the average worker's wage, nearly *ten times more* than in 1970.[68] At the same time, the majority of earners in the middle and bottom ranges—the very ones whose improved productivity the private economy left without much reward—now also shoulder proportionately more of the tax burden relative to their overall share of income.

Indeed, present tax policy seemingly aims at depriving the government of the very resources necessary to deal with the shortages of opportunity. How often do we hear it said today, following the long progression of tax cuts amounting to hundreds of billions of dollars annually at the federal, state, and local levels of government, that the revenues simply don't exist to boost the Earned Income Tax Credit and other programs significantly that would assist employed workers and their families; to expand adequate health care coverage to all working families; to enlarge outright grants as well as loans at the post-secondary level for middle- and low-income families or to do much of anything

that calls for dramatic funding increases in "underperforming" schools; to provide a comprehensive prescription drug benefit within the present Medicare program; to expand unemployment assistance enabling it to cover a larger proportion of unemployed workers; or even to fund the existing obligations we have in these and other areas (the nation's aging infrastructure, for example) properly for the future? The money isn't there because it has been drained away by of a succession of tax reductions focused on households at the very top levels, along with successful personal and corporate schemes to avoid taxes altogether. On top of that, we've then borrowed from Social Security surpluses to stem the deficits resulting from the tax reductions, putting Social Security into greater peril.

To rework the phrase of the elder George Bush: "We have more wallet than will."[69] We have the ability but lack the desire. Why is this so?

The answer is complicated but certainly lies partly in the understanding of freedom itself that now prevails. Most of the necessary measures call for greater collective action and governmental intervention. In this, they run up against today's dominant free-market mentality that market outcomes more or less reflect what individuals and families deserve under freedom with the result that, as the common saying goes, "raising taxes means less freedom." This individualist notion, emphasizing the pursuit of self-interest, has taken center stage in our thinking about freedom, notwithstanding its indefensibly narrow idea of the obligations we have to one another under freedom. Ironically, the very political leaders who propose greater governmental involvement in the economy in order to honor those obligations have helped tighten the free-market view's grip on the way we look at freedom. Most of those leaders call for governmental economic activism not in the name of individual freedom, or the moral obligations we have to one another that are necessary for freedom, but in the name of social equality, fairness, and communal values. Indeed, they rarely, if ever, mention freedom as an aim. The implication of their silence is that equality, fairness, and community are the aims they seek in calling for governmental intervention and that, in their view, those aims are different from and somehow superior to freedom.

For advocates of governmental intervention in the economy, and both equality and fairness, it was not always this way. Promoting the New Deal, Franklin Roosevelt effectively translated his far-reaching programs of collective societal action through government into the language of individual freedom and its obligations. In his fireside chats, he told the nation how those policies

were necessary to preserve and advance freedom for every American. "On Moving Forward to Greater Freedom and Greater Security" was the title of one of them. Appealing to the American people in his second inaugural address, he recalled that our forefathers "established the Federal Government in order to promote the general welfare and secure the blessings of liberty to the American people. Today we invoke those same powers of government to achieve the same objectives."[70]

In a succeeding State of the Union address, Roosevelt inspired the nation with his enunciation of "the four freedoms." Lying at the core of the four freedoms was the freedom from want—freedom from poverty and disadvantage. In 1944, in his State of the Union address, Roosevelt proclaimed, "True individual freedom cannot exist without economic security and independence." Here Roosevelt expressly echoed the transcendent precepts of the Founders going back to the Declaration, which gave birth to the nation. In the 1950s and 1960s, too, the emphasis of governmental action to advance civil rights was on *freedom,* the rights of blacks as *free* individuals, and not simply equality. The fact of the matter is that the equality, fairness, and community that proponents of governmental activism in the economy call for today gain much of their justification from the reasoning of individual freedom, particularly from the principles that make individual freedom in a property-owning society surely moral. Yet that truth cannot have educational value or political effect as long as it goes unexpressed.

Senator Edward Kennedy arguably has been this era's leading liberal advocate of affirmative government in the economy. Quite a few of the policy actions he has called for would move the nation closer to meeting the obligations concerning economic opportunity that we have to one another under liberty. Richard Burke, who served as Kennedy's assistant for many years, had this to say about the senator's political philosophy: "The crux of his political philosophy," Burke observed, "[is] that the more fortunate should help the less fortunate in order to bring equality to all facets of society."[71] What President Roosevelt once touted in the name of individual freedom, Senator Kennedy and many others who share his tendency today propose in the name of equality.[72] The result has been to leave a vacuum in thinking about freedom and our obligations to one another under freedom. It is a vacuum that the deficient free-market view of liberty only too happily filled. That enabled free-market liberty to take the offensive in promoting this chief value and placed liberals, increasingly articulating egalitarian and communitarian goals, onto the political defensive. In a nation that identifies so deeply with individual freedom,

equality as an expressed end goal will rarely trump freedom. In any contest between the two, what is proposed in the name of freedom will ordinarily prevail. Over the years, liberal thinking declined in popular appeal while conservative thinking grew in power within both the public and the halls of Congress.

In the wake of these developments, progress toward making freedom genuine for all or even most Americans, and not just some, has stalled, in places going into sharp reverse. Large numbers of Americans have been hurt in the process, in many different ways. An important step must occur for America to resume the journey. That step is the revival of a way of thinking about individual freedom capable of challenging the free-market idea in the name of the end goal and morality of individual freedom itself. Genuine freedom provides that possibility. It represents the sole perspective on freedom committed to what the nation promises through the American Dream—the opportunity for each and every individual to be able to make a dignified living through sustained work and to improve his or her living through improved work. It is the same perspective on freedom that traces back to the creators of the nation themselves, to their deepest ambitions for freedom. It is the same view of freedom that was held by the principal authors of both of our major political parties today, Thomas Jefferson and Abraham Lincoln.[73] It is indeed the only way of thinking that is morally tenable within the historic liberal process of reasoning about freedom that moved the Founders, the very process that leading adherents of the free market turn to themselves, mistakenly we have seen, to try to justify their own claims about individual freedom.

Many areas in which fundamental transgressions of individual liberty occur today face a similar kind of problem. That is, they involve misconceptions of what individual liberty calls for and the kinds of obligations it places upon us in order to be surely moral. We follow only a partial view of liberty, for instance, when we regulate financial contributions for political purposes on the narrow basis of their potential corrupting effect while at the same time ignoring their larger, terribly debilitating effect on the equal political standing of citizens. Freedom does not and cannot equate morally to a simple free-for-all if doing so undermines the level of political equality freedom requires in the making of laws that have coercive power over all our lives, that we are all obliged to obey. We cannot progress toward solving transgressions of individual liberty, either, if we continue to follow values that differ from the morality of liberty, perhaps believing the values to be the same, as when we allow federalism to trump the

morality of liberty in the rules and results of our elections. Nor, if liberty is most fundamental, can we persist in unnecessarily narrow interpretations of the reasoning behind judicial precedents when doing so abridges the most elementary moral principles of liberty, as, for example, in continuing to condemn individuals to prison whose counsel need pass hardly any standard of competency. And we ill serve individual liberty when we tolerate a laissez-faire philosophy that offends the basic precept of freedom obliging judges to be objective and impartial by permitting holders of power to select judges with strong ideological biases because those biases favor the power holders' own policy agenda. All those examples, along with the ones concerning economic opportunity and others described in earlier chapters, attest to an important truth: the many obligations we have to one another under liberty require much more robust expression in order for the public to understand them. There are practical solutions that would relieve each of the problems just described.[74] Yet unless and until the obligations are well understood, the nation cannot progress very far toward honoring them.

To be sure, a few exceptions exit during the past three decades whereby large-scale change took place relating to freedom, showing that the nation is capable of undertaking such action. Perhaps the greatest exception concerns the series of massive rollbacks of regulatory regimes spanning entire industries that, as we observed earlier, were considered unnecessarily restrictive. The rollbacks have been so substantial as likely to have gone too far in certain instances. Involving scores of measures, deregulation began in the late 1970s under the Carter administration and continued through the 1980s and 1990s. The measures, in turn, suggest the importance that the ascendant view of freedom has for what we do and are able to do. In this regard, it is revealing, and quite instructive, that this area in which sweeping reform proved possible across many different domains gained its impulse and powerful momentum from that very prevailing view, the free-market view of freedom.[75]

CHAPTER TEN

Rediscovering America's Vision

Individual freedom has proven to have an irresistible appeal, in many places around the globe, for good reason. Its transcendent power comes from regarding each individual as precious, as sacred, as an end purpose in his or her own right. Understood as an end in his or her own right and never simply a means to the ends of others, each individual must be free to decide on his or her own course of action, without unwanted external restriction, consistent with every individual having an equal freedom. The Framers and other American revolutionaries were the first to build a nation with this ideal of freedom in mind.

Although it focuses on the individual, though, this ideal of freedom is by no means individualistic. It is not about the Marlboro man, the solitary unrestricted individual free to ride the range and roam wherever he desires. Nor is this ideal of freedom the individualistic free-market version that prevails today. Freedom, genuine freedom that is morally sustainable, freedom that reflects the thinking of the Founders, is inherently a *social* idea. It concerns relationships between and among individuals and the obligations that must be present among those individuals in order for freedom to exist and at the same time

remain moral. Those mutual obligations involve a profound, challenging ethic, far from an "anything goes" way of thinking.[1] I have described the most crucial obligations in the preceding pages.

Accepting the mutual obligations embedded in genuine freedom, and taking them seriously, are necessary for us to rediscover our bonds with one another, a sense of belonging, a sense that the nation has a greater purpose here at home that is compelling to us. Without this idea of freedom, these feelings cannot grow strong in an abiding way, at least not unless there is an external enemy to draw us together. Free-market liberty is inadequate. No differently than at the founding, freedom continues to be the value with which we identify most deeply as a nation. Yet the very narrow mutual obligations that free-market liberty contains, grounded in the pursuit of self-interest, do not provide the necessary foundation to develop a true connection with one another or a meaningful feeling of belonging. For this reason, flags appeared on our cars and homes and clothes along with slogans such as "Proud to be an American" only *following* September 11. As Ronnell Jonas, owner of a small roadside café in Nebraska's prairie heartland, told me eighteen months later, "Something is wrong with this picture." She went on to say, "Most times, people just try to get everything they can. They're simply out for themselves. The War on Terrorism hasn't changed that. It hasn't asked any real sacrifice from any of us, outside the military." A small flag with ragged edges, faded by the sun, remained pasted on her café's own front window.

We have seen, at bottom, that the prevailing free-market view cannot be defended within the moral reasoning of freedom itself, indeed within even its own reasoning process. It cannot gain our esteem ultimately, as a result, precisely because it is morally flawed. And because we are unable to give it our esteem, free-market liberty cannot furnish a sustainable foundation for developing a sense of larger national meaning that is compelling to us. As George W. Bush recognized, the free-market idea "cannot touch the human heart."[2]

This is to say that even proponents of free-market freedom sense its defects. Those defects prompt its advocates to try supplementing the view with other values, such as compassion. The addition of compassion, in effect, is intended to fill the gap between free-market freedom and genuine freedom, between the morally defective and the morally sound. The problem is that compassion does not create *obligation,* which is what freedom involves in order to be morally tenable. Consequently, it is unable to fill the moral gap. People who are left to

depend upon others' compassion for enjoyment of their rights are not free in any genuine sense. Compassion has a vital place, but never as a substitute for the obligations of freedom.[3]

Freedom gains its universal resonance from the moral obligations it entails, for only through meeting those obligations can it honor its pledge to treat each individual as sacrosanct, as an end purpose rather than a means to the ends of others. That pledge is what gives freedom its timelessness, what enables it to afford hope to every person. Disregard the obligations that underpin the pledge, to the degree that we do, and the power of freedom to move the human mind and soul loses its force.

We might think of the obligations and honoring them as describing the common good under freedom.[4] Neglect them, as the free-market view does, and much of the idea of the common good also dissolves. Such a view of freedom, for this reason, cannot lead us to decisions about the appropriate actions for the nation to take in a way that is morally comprehensible to us.

As a result, the free-market idea of freedom ends up placing a good part of the collective political life of the nation beyond our power to understand. In the free-market view, the market is where the action should be, with the political system squarely on the sidelines. This depreciation of the role of politics and government renders what government does and must do impossible to make sense of, impossible at least in terms of the idea of freedom. Over the past four generations, until recently, a massive expansion of societal action occurred through the institutions of government. We have seen that how and where the government expanded, though the expansion is not yet sufficient, followed in a direction fitting quite comfortably with genuine freedom and the mutual obligations that accompany it. Like a public philosophy, genuine freedom makes the developments morally intelligible. By contrast, most of those developments went dramatically beyond anything that a free-market perspective on freedom can justify. From that perspective, it became difficult to discern much meaningful connection between the activities our government took on or expanded and the prized idea of individual freedom. Seemingly disconnected from the aims of freedom, politics and government came to many Americans to seem incomprehensible, even illegitimate. The free-market view of freedom, as it ascended, increasingly placed us at odds with our own actions and against the narrative of the nation's story over the prior half century.

Made incoherent to us, politics and government could never attain much progress in our eyes. How could it be otherwise given the simple promotion of

individual self-interest we associated with freedom as the most basic value of the nation? We ended the period thinking of politics mostly as aimless, as narrowly self-interested, as having little high purpose. It is just as the columnist David Gergen wrote in the summer of 2001: we saw ourselves living in "smaller times" led by "smaller men." For this reason, he said, we were searching for something more, something greater. Nothing we experienced appeared to rival the worthy causes, the noble advances, and the high-minded leaders of earlier generations. Nor did there seem to be anything comparable in politics to the extraordinary progress we had experienced in other areas like science and technology.

How hugely the actual historical picture differs from this bleak perception of politics as mostly aimless and of little high purpose—at least until recently. Some of the particulars from prior chapters bear drawing together and repeating. About 3 million Americans today were alive ninety years ago. At that time, only ninety years ago, a majority of all adult American citizens were still disenfranchised from the vote; persons of color were forcibly segregated at every level—socially, economically, and politically—across practically half of the nation; lynchings were so common as to be routine; tyrannical political machines and their bosses, with no pretense of democracy, controlled many of our states and cities; in elections throughout the nation, some voters were given scores of times the weight of other voters; United States senators were not yet popularly elected, and few party candidates for political offices at the federal, state, and local level were subject to nomination by popular election; individuals and their families were left completely to the whims of supply and demand, with no recourse either to an open frontier any longer or yet to any public policy remedies, this notwithstanding the brutal poverty and severe scarcities of economic opportunity that were present; workers and consumers had little or no protection in their dealings with businesses and producers; defendants were imprisoned and deprived of their liberty or sent to their deaths, constitutionally, without ever having a lawyer, through narrowly selected juries intentionally biased against them, and based upon evidence that the court knew had been illegally obtained and could well be false; and states, not yet covered by the federal Bill of Rights, retained the power to deprive citizens of the most basic rights of free speech, religion, conscience, and assembly.

That was our nation just ninety years ago. From the perspective of the morality of individual freedom, ninety years ago was something of a dark age compared with today, similar to the way we are likely to think of the technology of

that time (whose change, too, for reasons we have seen, had far more to do with the involvement of government than is commonly acknowledged).[5] The progress that brought us closer to freedom took numerous struggles requiring extraordinary sacrifices. They culminated in breakthroughs that reduced or removed all the problems just described. Every one of the advances came into place during a period of approximately sixty years, ending in 1970 or 1975. The degree of progress in honoring the obligations of freedom over those sixty years was breathtaking, rivaling the advances of any past generation of Americans. Sweeping along many separate fronts, one after another, the advances compare roughly, even, with the progress toward freedom that occurred during the age of Washington, Jefferson, and Madison. A view that emphasizes the mutual obligations freedom entails and takes politics seriously helps us to grasp how immense the headway was that happened within the span of a single lifetime, an era during which many of us were alive.[6] It is progress not simply worthy in itself. It also connects the era—for many Americans, our own era—to all previous generations and to the loftiest goals of American history reaching back to the very beginning. Searching the past to rediscover a sense of high aims and noble purpose, we did not need to go all the way back to the Founders or indeed to any other era. We needed only to look to our own selves and to the extraordinary change we proved able to bring about.

As far as we were able to travel, though, we still remain a considerable distance from the destination. What is more, progress has halted in recent years, in places even reversed. The gaps between the moral idea of freedom and actual experience are substantial and growing larger in many cases. They have been documented in the preceding chapters. Relative to what liberty requires, more than half of all Americans today are deprived of the freedom due them in ways that seriously harm their lives.[7] What has happened in their lives strikes many thousands of Americans at the most profound level possible, eliminating their actual physical freedom. That immense contradictions exist between the moral idea of liberty and the reality that Americans face has been true ever since the nation's founding. They mark nothing new, with one difference. In the past, the nation headed in the direction of reducing, if not eliminating, those discrepancies, stride after difficult stride. In this manner, notwithstanding the remaining violations, we showed faithfulness as a nation to the morality of individual freedom. We might not have been perfect, as the saying goes, but we weren't done yet. We experienced the thrill of progress.

That progress and thrill have disappeared. For about three decades now, we

have managed little or no advance toward resolving the contradictions and fulfilling the obligations necessary for freedom. Given the great magnitude of the contradictions, and the absence not simply of progress but of any realistic prospect today for making significant further headway, we can no longer honestly describe the nation as attuned to the morality of the value it professes to revere. Claiming that the nation gives high priority to the morality of freedom may be needed for our sense of identity and self-esteem, and our feeling of humanity, but it cheapens the morality and debases it. Opting for the easy road, it fails to respect the imperatives that make freedom morally tenable and so timeless while professing that we do. Within this context of cheapening and superficiality, it was only natural for our leaders to come to seem small in our eyes and our times to seem bereft of much real meaning or significance.

The loss of momentum and areas of reversal that affect the lives of so many Americans equate directly with the ascendance of the individualistic free-market idea of freedom. In contrast with genuine freedom, this idea of freedom is not at bottom that of the Founders, or of our loftiest presidents after them, or of the creators of either of our two major political parties. Nor does it ultimately subscribe to the promise of the American Dream. And it cannot be defended as moral even within the process of reasoning that underlies the free-market idea of freedom itself.

But it has taken hold nonetheless. Those leaders and groups speaking most directly to the kinds of obligations we have to one another for freedom to be morally sustainable, primarily liberals and progressives, rarely emphasize individual freedom as the aim, especially in the context of their broad economic agenda. They speak in terms of values such as social equality instead. This emphasis on values other than individual freedom has left free-market liberty alone to capture our understanding of freedom, virtually without challenge. In a nation that identifies so deeply with freedom, this development has contributed to the steady political decline of liberalism over the past few decades as its agenda became increasingly disassociated in the public mind from the idea of individual freedom and attached instead to equality and the promotion of government.

In effect, the champions of the obligations required to make freedom surely moral, within its own reasoning, have stopped championing freedom. It was not always that way. Several generations ago, Franklin Roosevelt spoke fervently in the language and aspirations of freedom, as did John Kennedy after him.[8] By sharp contrast, those who claim they champion freedom today and

call themselves "the freedom revolution" fail to promote the obligations that are necessary to make liberty moral. Stalled progress and even reversal have been natural results.

We can resume the upward trajectory of our history toward the promise of freedom, the American vision of freedom. We can reclaim freedom that is genuine and thereby regain a moral direction and concept of the common good worth our admiration and sense of high purpose. We can restore the foundation necessary for us to understand and feel the ties we have with one another as Americans and with our history. We can do so, however, only by overcoming the fundamental disjuncture I have described. We must learn how to join the advocacy of individual freedom once again with advocacy of the mutual obligations necessary for freedom to be moral. Only by reconnecting the promotion of freedom with the obligations that make freedom morally sustainable can we do what is necessary to attain for ourselves—*here at home for our own people*—the goal that President George W. Bush proclaimed before the world when he said, commemorating September 11: "We will make this an age of progress and liberty." No calling could be more noble or exalted. Nor could any cause, within our own nation, be more demanding of us.

Notes

ONE: The Failure of Free-Market Liberty

1. The names of individuals have been changed to protect the confidences of the students.

2. Hendrick Hertzberg, "Stimulation," *New Yorker,* November 12, 2001, p. 46.

3. The Survey Research Center of the University of Michigan had recorded a substantial falloff of trust in government and in politics more generally among Americans for nearly forty years, going back to the early 1960s. Then, about two-thirds of Americans said they trusted government to do what was right.

4. David Gergen, "A Blast from the Past," *U.S. News and World Report,* August 6, 2001, p. 56.

5. *New York Times,* September 16, 2001, sec. 4, p. 10.

6. I use the words *freedom* and *liberty* synonymously throughout the book.

7. Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969), part 3. This idea of freedom as individuals remaining free from outside restraint as long as they do not interfere with the like rights of others goes back at least as far as John Locke. He spoke of freedom as grounded in the specialness, or natural equality, and thus inviolability of all individuals. All having been created in freedom, in Locke's thinking, no individual was to be viewed as subordinate by nature to any other or as simply a means to the ends of another. See John Locke, *Of Civil Government: Second Treatise* (Chicago: Henry Regnery Co., 1955), chap. 2, secs. 4–6.

8. Quoted in Howard Fischer, "Bush Places Free Trade above Land, Labor Issues," *Arizona Daily Star,* December 8, 1999, p. 15A.

9. See, for example, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986); Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988); and David Schmidtz, *The Limits of Government: An Essay on the Public Goods Argument* (Boulder, Colo.: Westview Press, 1991). See also Friedrich Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) and *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), and Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962). As I point out in Chapter 2, at times writers such as these will set forth more extensive proposals, but those proposals generally contradict the free-market perspective, often leading the authors later to disavow them.

10. Chapter 2 speaks to the views of a range of Framers and other leading revolutionaries and Chapters 6 and 9 to Presidents Lincoln and Roosevelt.

11. "Bushes Lead a Commemoration," *New York Times,* September 10, 2002, p. A19.

12. Arianna Huffington, "Compassion for Enron Conservatives," *Arizona Daily Star,* January 11, 2002, p. B7.

13. Stephen L. Carter, "Reflections on an America Transformed," *New York Times,* September 8, 2002, sec. 4, p. 15.

14. Gergen, "Blast from the Past."

15. George Stigler, "Director's Law of Public Income Distribution," *Journal of Law and Economics* 13 (April 1970), as quoted in John Gray, *Beyond the New Right: Markets, Government, and the New Environment* (London: Routledge, 1993), p. 25.

16. "Many Americans Have Financial Worries," *USA Today,* July 10, 2002, p. 6A, reporting results of CNN Gallup polls.

17. A common view of proponents of the free-market perspective is to see most government expansion as the actual antithesis of freedom with the result that it becomes a natural goal, to quote Americans for Tax Reform president Grover Norquist, to want "to limit the size and scope of government so as to maximize individual liberty." Quoted in Philip Gourevitch, "Fight on the Right: In Pennsylvania's Republican Primary, Conservatives Test the Party Line," *New Yorker,* April 12, 2004, p. 37.

18. Michael Walzer, *Interpretation and Social Criticism* (Cambridge: Harvard University Press, 1987), p. 23.

19. Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle between Government and the Marketplace That Is Remaking the Modern World* (New York: Simon and Schuster, 1998), p. 389; italics in original.

20. Dick Armey, *The Freedom Revolution: The New Republican House Majority Leader Tells Why Big Government Failed, Why Freedom Works, and How We Will Rebuild America* (Washington, D.C.: Regnery Publishing, 1995).

TWO: Freedom and the Promise of Economic Opportunity

1. Private property includes land, goods, and a person's own labor, health, mind, and body. An individual who had no private property and always needed the agreement of others, of course, would have nothing over which he or she could exercise control and so would have nothing over which he or she could exercise his liberty. At the same time, obviously, we will see that private property also results in the nonfreedom of others in that it reduces or eliminates the freedom of all others with respect to that property. How this paradox becomes consistent with freedom is a main function of the Lockean proviso, discussed in this chapter.

2. James Madison, "Property," *National Gazette,* March 27, 1792, p. 166.

3. Madison's phrase about property that he put in italics, "*which leaves to every one else the like advantage,*" was intended to be understood as a surrogate for the Lockean proviso. Later in this chapter, I discuss the centrality of the Lockean proviso to the moral defense of the right of private property ownership as a liberty. For Madison's thinking, see Richard K. Matthews, *If Men Were Angels: James Madison and the Heartless Empire of Reason* (Lawrence: University of Kansas Press, 1995), pp. 118–20, 171–72. Madison's thinking here applied to every citizen, with or without landed property and regardless of whether the citizen had the franchise.

4. Madison quoted in Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990), p. 45.

5. Philip R. Fendall, ed., *Letters and Other Writings of James Madison* (Philadelphia: Lippincott, 1865), vol. 3, p. 162.

6. Nedelsky, *Private Property,* p. 33.

7. Julian P. Boyd, ed., *The Papers of Thomas Jefferson, 1760–1776* (Princeton, N.J.: Princeton University Press, 1950), vol. 1, p. 344.

8. See Daniel Vickers, "Competency and Competition: Economic Culture in Early America," *William and Mary Quarterly* 47 (January 1990), pp. 3–29; Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), p. 4; Celeste Michelle Condit and John Louis Lucaites, *Crafting Equality: America's Anglo-African Word* (Chicago: University of Chicago Press, 1993), p. 43.Vickers ("Competency and Competition," p. 3) defines *competency* to early Americans as "a degree of comfortable independence." Independence, in turn, implied competency. See also note 9, below.

9. For the importance of independence in the thinking of the revolutionaries, see Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Knopf, 1992). "The Revolution," he concludes, "became a full-scale assault on dependency" (p. 179). See also Gordon S. Wood, *Social Radicalism and the Idea of Equality in the American Revolution* (Houston, Tex.: University of St. Thomas, 1976), pp. 9–10.

10. See Elizabeth Bussiere, "The Origins of 'Welfare Rights' in the Warren Court's 'New Property' Theory" (paper delivered at the annual convention of the American Political Science Association, Boston, 2002). Paine developed a far-reaching program of public assistance to the poor, financed partly by taxes on estates, that he sets forth in *The Rights of Man*. See Howard Fast, ed., *The Selected Works of Tom Paine* (New York: Duell, Sloan and Pearce, 1945), pp. 249–64. On Paine, his extensive program of public action, and the importance of economic opportunity, see Thomas A. Horne, *Property Rights and Poverty: Political Argument in Britain, 1605–1834* (Chapel Hill: University of North Carolina Press, 1990), pp. 203–9.

11. See Fast, *Selected Works of Tom Paine*.

12. Pauline Maier, *American Scripture* (New York: Knopf, 1997), p. 87. On liberals' premise of natural equality (mirroring Jefferson's phrase "All men are created equal"), John Locke wrote that men were born in a state of equality, what he called "equality of men by nature." See John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), ed. C. B. Macpherson, secs. 4–5 (hereafter cited as *Second Treatise*).

13. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967), pp. 27, 35, 36.

14. As examples, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986); Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988); and David Schmidtz, *The Limits of Government: An Essay on the Public Goods Argument* (Boulder, Colo.: Westview Press, 1991).

15. Locke came to the conclusion that each human being must be regarded as an end purpose rather than merely a means from the perspective that we are all ends with free will as creatures of God. The same conclusion, though, can be drawn from the stipulated presumption that every individual person is precious—sacred—in his or her own right and thus inviolable.

16. On the potential conflict between liberty and private property ownership, see G. A. Cohen, "Capitalism, Freedom and the Proletariat," in Alan Ryan, ed., *The Idea of*

Freedom (Oxford: Oxford University Press, 1979), pp. 9–25; Jeremy Waldron, *The Right to Private Property* (New York: Oxford University Press, 1990), pp. 267–78; Hillel Steiner, "The Natural Right to the Means of Production," *Philosophical Quarterly* 27 (1977), pp. 41–49.

17. For the argument, see Locke, *Second Treatise,* chap. 5. See also Gauthier, *Morals by Agreement,* chap. 7.

18. Locke, *Second Treatise,* sec. 26.

19. Ibid., secs. 33, 34.

20. Ibid., sec. 27.

21. Ibid., sec. 33.

22. Ibid., sec. 34.

23. See, for example, Nozick, *Anarchy, State, and Utopia,* p. 178; Gauthier, *Morals by Agreement,* chap. 7; Narveson, *Libertarian Idea;* and Schmidtz, *Limits of Government,* p. 20. They all reach the conclusion that the Lockean proviso, in some form, is necessary to the morality of private property under liberty. Some other ways of attempting to defend free-market liberty are discussed later in this chapter in the section titled "Is Leaving 'Enough and as Good' Truly Necessary?"

24. Locke (*Second Treatise,* chap. 5) repeatedly refers to the subsistence conditions of people living under common access similar to the original condition as the proper reference point to compare with material conditions in a regime of property ownership. As an example, he points to the material conditions of seventeenth-century English laborers and peasants and observes that they lived as kings in comparison with primitive peoples still living under regimes of common ownership and access.

25. See Nozick, *Anarchy, State, and Utopia;* Gauthier, *Morals by Agreement;* Narveson, *Libertarian Idea;* Schmidtz, *Limits of Government*. See also below, note 27.

26. Free-market advocates operating from the Lockean proviso, such as those cited in note 14 of this chapter, take this minimal view, as does Locke himself. I provide examples in note 27, below. Proponents who defend the free market from another point of reference may propose more expansive public assistance, as I discuss later in this chapter (see the section "Is Leaving 'Enough and as Good' Truly Necessary?"). Milton Friedman does so, for example, but the defense for his more expansive proposal then does not stand up to the logic of the free-market perspective, as I demonstrate there. It is common for many proponents of free-market freedom to see governmental intervention as the opposite of freedom, as, for example, in the proposition they often advance that "less taxes mean more freedom." Grover Norquist, president of Americans for Tax Reform, takes this adage to the level of a general assumption when he notes that his end goal is "to limit the size and scope of government so as to maximize individual freedom." See Philip Gourevitch, "Fight on the Right: In Pennsylvania's Republic Primary, Conservatives Test the Party Line," *New Yorker,* April 12, 2004, p. 37.

27. For instance, Gauthier (*Morals by Agreement,* pp. 218–21) finds the reasoning of freedom compatible with the following result occurring through mutual voluntary exchange: "The rich man may feast on caviar and champagne, while the poor woman starves at his gate. And she may not even take the crumbs from his table, if that would deprive him of pleasure in feeding them to his birds" (p. 218). Nozick (*Anarchy, State, and Utopia,* p. 331), though he believes such situations will not occur, concludes that an individual selling him- or herself into slavery is compatible with freedom if the individual believes that will improve his or her situation. Friedrich Hayek (*The Constitution of Liberty*

[Chicago: University of Chicago Press,1960], p. 137) observed that voluntary exchange leaving an individual "'at the mercy' of the only man willing to employ me" in a job barely supporting physical survival comports with that individual's freedom.

28. Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle between Government and the Marketplace That Is Remaking the Modern World* (New York: Simon and Schuster, 1998), p. 389; italics in original.

29. Quoted in Arianna Huffington, "Compassion for Enron Conservatives," *Arizona Daily Star,* January 10, 2002, p. B7.

30. Maier, *American Scripture,* pp. 135–36.

31. Locke, *Second Treatise,* sec. 25.

32. Ibid., sec. 26 ("God, who has given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being." The earth was given, thus, for comfort and not only for preservation. See also secs. 34 and 44.)

33. Ibid., secs. 32–34.

34. Ibid., secs. 31, 51, 107.

35. In section 51 of the *Second Treatise,* Locke speaks of appropriation in the original condition as bounded. In section 107, he explicitly recognizes the state of nature as one of relative economic equality, describing it as "the equality of a simple poor way of life."

36. Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Knopf, 1998), p. 11; A. E. Dick Howard, "For the Common Benefit: The Virginia Declaration of Rights of 1776," in *The George Mason Lectures: Honoring the Two Hundredth Anniversary of the Virginia Declaration of Rights* (Williamsburg, Va.: Colonial Williamsburg Foundation, June 12, 1976), pp. 20–21; David Brion Davis, *Revolutions: Reflections on American Equality and Foreign Liberations* (Cambridge: Harvard University Press, 1990), p. 20; Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (New York: W. W. Norton, 1980), p. 237; and Jack P. Greene, *All Men Are Created Equal: Some Reflections on the Character of the American Revolution* (Oxford: Clarendon Press, 1976). See also the opening paragraph of the subsection later in this chapter entitled "The Restatement and the Thinking of the Founders," along with the material on James Madison in note 52 below.

37. Emily Gersema, "Rolls of Food Stamp Clients Increase," *Arizona Daily Star,* November 3, 2002, p. A3.

38. Steven Greenhouse, "Labor Turns to a Pivotal Organizing Drive," *New York Times,* May 31, 2003, p. A11.

39. Political scientist Jennifer L. Hochschild (*Facing Up to the American Dream: Race, Class, and the Soul of the American Nation* [Princeton, N.J.: Princeton University Press, 1995], p. 30) observes that people who fall significantly behind are not seen as relative equals because it is often presumed that success and failure result from traits under one's own control.

Being considered inferior can be excruciating, as the experience of Jim Saleet of Lakewood, Ohio, suggests. He worked in the pharmaceutical industry and, with his wife, Joanne, lived in a single-family house in a neighborhood of nice homes. They had lived there for thirty-eight years when the town condemned their own and several of their neighbors' properties for a civic project: "You don't know how humiliating [it] is to have people tell you, 'You live in a blighted area,' and how degrading that is," he said. Reported by Mike Wallace, "60 Minutes," September 28, 2003, CBS Television.

40. Locke, *Second Treatise,* footnote to sec. 135.

41. Some are referring to this point when they describe the right of an individual in the original condition to the surplus from his or her own labor.

42. Lawrence Mishel et al., *The State of Working America, 2002–03* (Ithaca, N.Y.: Cornell University Press, 2003, advance-proofs copy), p. 158, table 2.18.

43. Quoted in Greene, *All Men Are Created Equal,* p. 21.

44. Locke himself wrote: "A man may labor for himself or work for another but only if an alternative is available. If it is not, he cannot labor for himself and he cannot be forced to work for another." Quoted in Andrew W. Dobelstein, *Social Welfare: Policy and Analysis* (Pacific Grove, Calif.: Brooks/Cole, 2003), pp. 278–79.

45. For others who reach a similar conclusion, see A. John Simmons, *A Lockean Theory of Rights* (Princeton, N.J.: Princeton University Press, 1992), especially chap. 5, and Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (New York: Oxford University Press, 1995). Their approaches, though, still leave open the possibility of dire poverty for some. Sreenivasan focuses mainly on preservation and Simmons on the right to "a fair share of the commons" consistent with "the opportunity of a living," (p. 293) and "access to an independent livelihood" (p. 294). It seems, though, that a homeless person who lives off the deposits on can and bottle returns could meet this definition unless a dignified or minimally socially decent living accompanies the right of opportunity.

46. Individuals with access to opportunities to attain a minimally decent living by societal norms through work and to improve their living by improving their work are what I call relative economic equals. Chapter 3 details measures for both the standard of living and the improvement of work.

47. As part of this opportunity, the availability of personal time is a requisite as well, sufficient to permit an individual the freedom to gain political inclusion that is a part of individual liberty. In the original condition, individuals could attain a standard of living usual to that period with an amount of work that was common to most others. Going into civil society also would require that that opportunity call for an amount of work common to others that leaves sufficient time available for involvement as a political equal in the making of collective societal decisions that every person is obliged to obey. See Chapter 8, section entitled "The Political Obligations of Liberty."

48. Access to the common in the original condition meant that no able-bodied individual need depend for a living upon any other individual. See also above, note 44 and the corresponding text. Keeping from experiencing servile treatment may also require some form of collective organization among workers. Issues arise as well about self-direction—an individual's control over the work process, control each individual exercised in the original condition.

49. Locke did so on grounds that, given the sacredness of human life to God, each human being not only had a right to life but a duty to preserve both his or her own life and the life of others. "We know that God hath not left one Man so to the Mercy of another, that he may starve him if he please. . . . He has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denyed him, when his pressing Wants call for it." *Two Treatises on Civil Government* (London: George Routledge and Sons, 1884), I, sec. 4. He also writes: "Every one, as he is bound to preserve himself, and not quit his station willfully, so, by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind." *Second Treatise,* sec. 6. On one interpretation, the preservation of life as a paramount priority could require a minimally decent standard of living by contemporary standards to the

extent that the absence of that standard (including access to adequate nutrition, housing, and health care) meaningfully diminishes normal longevity.

50. Recall, too, that for reasons mentioned above, in note 47, this assurance must also involve hours of labor common to most others, not unreasonably exceeding them.

51. "Means" here, within the idea of adequate opportunity, includes not only landed property and personal wealth, as independence strictly did in the eighteenth century. Logically, also, "means" includes labor through employment assuming it provides a dignified living standard and that sufficient choice of employments exists so that individuals do not become dependent upon the will and subject to the caprice of any employer or small number of employers. Independence was clearly an element of the original condition whereby one always had access to the resources in the common to mix with one's own labor. To approach this condition in a market economy requires that a worker have choices among different openings sufficient to address issues having to do with subjection to the will and caprice of another through economic dependency. Additional issues arise, too, about an individual's control over the work process, control each individual exercised in the original condition. See also above, note 47.

52. See the citations above, in note 36. On Madison, also, see Saul K. Padover, *The Complete Madison: His Basic Writings* (New York: Harper and Brothers, 1973), pp. 322–24. As Madison stated there, the ability of the greatest number of citizens to attain a dignified living through their labor, what he called competency, was best for a free society. For the meaning of competency in early America and its relation to independence, see Vickers, "Competency and Competition," p. 3.

53. With respect to the availability of time, in particular, see note 47 of this chapter and also Chapter 8.

54. See the discussion earlier in this chapter, in the section entitled "Free Market Liberty," and the accompanying notes.

55. See above, note 46.

56. Even in the mid-nineteenth century Lincoln did so, for example (Judith N. Shklar, *American Citizenship: The Quest for Inclusion* [Cambridge: Harvard University Press, 1991], p. 82). For others, going back to Jefferson, see John E. Schwarz and Thomas J. Volgy, *The Forgotten Americans: Thirty Million Working Poor in the Land of Opportunity* (New York: W. W. Norton, 1992), pp. 173–74 and note 5. Not everyone agreed, including Malthusians such as Madison.

57. Garrett Hardin, "The Tragedy of the Commons," *Science* 162 (1968), pp. 1243–48.

58. Schmidtz, *Limits of Government,* pp. 20–31.

59. For examples of these proponents, see note 23 of this chapter.

60. See Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962). Friedman's justification for a guaranteed minimum income for all is that poverty is in essence a public good—that is, a market failure—and thus an area that is appropriate for government to address. It is a public good, he says, because everyone benefits from the elimination of poverty and gains that benefit even if others pay the cost, say, through charity. He argues: "I am distressed by the sight of poverty; I am benefited by its alleviation; but I am benefited equally whether I or someone else pays for its alleviation; the benefits of other people's charity therefore partly accrue to me" (p. 191). Yet surely not everyone shares this distress about poverty, say, if poverty is the result of laziness or irresponsibility. Despite that, everyone is compelled to pay for the alleviation of poverty if the means for that alleviation come through government and taxation.

Friedman's proposal for a guaranteed income, defended as addressing a public good and market failure, thus actually comes into conflict with each such person's liberty understood in free-market terms. No wonder that, as an advocate of free-market liberty, Friedman himself concludes that he makes this proposal for a guaranteed minimum income "with regret" (p. 195).

61. Friedrich Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944).

62. Although Hayek initially saw collective action and assistance of some kinds to be relatively harmless when wealthy states engaged in them, he later repudiated even them. See the revised preface for the 1976 edition of *The Road to Serfdom* (Chicago: University of Chicago Press).

63. Hayek, *Constitution of Liberty,* p. 137.

64. Some data suggest that greater inequality actually lessens economic growth. See, for example, a review of evidence in "For Richer, for Poorer," *Economist,* November 5, 1994, pp. 19–21. For a general review of research, see Philippe Aghion et al., "Inequality and Economic Growth: The Perspective of the New Growth Theories," *Journal of Economic Literature* 37 (December 1999), pp. 1615–60.

65. This concern differs, of course, from an objection to public intervention of a kind that would entitle able individuals to some minimum standard of living regardless of whether those individuals endeavor to provide for themselves. Philosophers associated with the Left have frequently supported this kind of entitlement. By contrast, the perspective of genuine freedom does not. Just as did Locke and the Founders, except in the cases of individuals who are involuntarily unable, it calls for gainful efforts as long as adequate opportunity exists for all. For liberal philosophers whose approaches justify financial entitlement of one kind or another without necessary connection to individual efforts to provide a living, even if adequate opportunity exists, recent examples are Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000); Bruce Ackerman and Anne Alstott, *The Stakeholder Society* (New Haven: Yale University Press, 1999); Philippe Van Parijs, *Real Freedom for All: What (If Anything) Can Justify Capitalism?* (Oxford: Clarendon Press, 1995).

66. Dave Carpenter, "Stock Analysts Get Inside Mc Donald's," *Arizona Daily Star,* September 30, 1999, p. B4.

67. Examples abound in Barbara Ehrenreich, *Nickle and Dimed: On (Not) Getting By in America* (New York: Holt, 2001). See also Barbara Garson, *The Electronic Sweatshop: How Computers Are Transforming the Office of the Future into the Factory of the Past* (New York: Penguin, 1988). Speaking to *Wall Street Journal* correspondent Tony Horwitz, the foreman of a poultry-processing plant in Mississippi described the jobs of workers there, now paid about $8.50 an hour. "It's tough work and will make you sore as hell," the foreman observed. Tony Horwitz, "9 to Nowhere: These Six Growth Jobs Are Dull, Dead-End, Sometimes Dangerous," *Wall Street Journal,* December 1, 1994, pp. A1, 8, 9. Demanding jobs at low wages were among the leading growth jobs at the time, Horwitz points out. The physical demands required, not to mention the low wages, are a very good reason why many people don't themselves want to do the kinds of jobs that Ehrenreich, Garson, and Horwitz describe; all the same, they want the products and services that those low-wage jobs provide.

68. Adam Smith, *The Wealth of Nations* (1776; New York: Modern Library, 1937), p. 79.

69. Locke surely takes this view, no differently than contemporaries in the same tradition such as Nozick.

THREE: Guidelines for American Social Policy

1. Jennifer L. Hochschild (*Facing Up to the American Dream: Race, Class, and the Soul of the American Nation* [Princeton, N.J.: Princeton University Press, 1995], pp. 17–19) speaks of three versions of the American Dream. The first version, which she describes as absolute, is that everybody has the opportunity to live a life with some decency, that is, the opportunity to attain at least a minimally socially adequate living by current societal norms. The second version, which she identifies as relative, is that "the American dream consists of becoming better off than some comparison point, whether one's childhood, people in the old country . . . anything or anyone that one measures oneself against." The opportunity to continually improve relative to some comparison point, however, must eventually lead to a level of some decency if one perseveres. The second version thus implies the availability of sufficient opportunity to succeed, eventually, in the absolute sense of the first version. The third version, which Hochschild describes as competitive, involves a form of success in which one individual wins over another: "My success implies your failure." This third version suggests that there is insufficient opportunity for all, which runs contrary to the very idea of the American Dream that if you work hard and persevere in this country, you can succeed. Few Americans, I wager, would say that the American Dream promises that there is enough opportunity only for some of us who work hard and are responsible.

2. An adequate living must also be obtainable through a usual amount of work. See Chapter 2, note 47.

3. For individuals who are involuntarily incapacitated or unable, see Chapter 2, text paragraph leading to note 49 and right after note 50. See also note 49 itself.

4. See Chapter 2, section titled "Free-Market Liberty."

5. In a modern market economy, education coupled with labor is needed to gain access to many opportunities able to provide a decent living, whereas in the original condition resources to provide a living were directly accessible through labor. As a result, each individual must by right have access to the opportunity for education that will enable him or her to obtain and occupy jobs paying wages able to support a socially decent minimum living, or better, and to improve that living through work. In addition, as Chapter 8 describes, individuals also have a right under liberty to the level of education necessary for deploying their political and legal rights effectively. In Chapter 4, note 2, I define more specifically the level of education that is required.

6. The figures on expenditures here and elsewhere refer to 2000 and to federal, state, and local expenditures combined. Data for these figures and the figures for other programs contained in table 3.1 in the text are found in the following: for class 1 policies, see U.S. Census Bureau, *Statistical Abstract of the United States, 2003* (Washington, D.C.: GPO, 2003), p. 290, table 447, and p. 285, table 442, for public education spending minus federal aid, and p. 360, table 540, for spending on job training, Pell grants, and Stafford loans. For class 2 policies, see ibid., p. 360, table 540, for governmental expenditures on the Earned Income Tax Credit and on in-kind benefits (one-half attributed to individuals holding jobs). For class 3 policies, see ibid., p. 356, table 535, for spending on Social Security retirement, survivors, disability, and workers' compensation benefits; p. 324, table 479, and p. 285, table 442, for federal retirement and disability and state retirement; and p. 356, table 535, for unemployment. For class 4 policies, see ibid., p. 360, table 540,

for TANF (welfare), general assistance, SSI, child and foster care, and in-kind benefits (one-half attributed to individuals in these programs).

7. Other exceptions (often tied to the receipt of welfare) involved access of able nonemployed individuals to in-kind benefits, the largest of them health care assistance through programs such as Medicaid.

8. Governments at all levels spend about $1.3 trillion on social programs outside the area of health care. Of this, about $109 billion—or 8 percent—is spent on welfare assistance, including the cost of in-kind benefits for nutrition, housing, and energy for families on welfare, and all benefits to individuals on Supplemental Security Income.

9. Recall, also, that there must be sufficient choice of jobs and openings for employees to prevent dependency of an employee upon any single or few employers. See Chapter 2, text at note 44 and the note itself.

10. The first quote is from Mollie Orshansky, "How Poverty Is Measured," *Monthly Labor Review,* February 1969, p. 38. The second quote is from an interview with Mollie Orshansky in William J. Eaton, "The Poverty Line," *New York Post,* April 4, 1970, p. 4.

11. U.S. Department of Health, Education, and Welfare, "The Measure of Poverty," Technical Paper II, September 1976, p. 8.

12. Quoted in Robin Toner and Robert Pear, "Bush Proposes Major Changes in Medicare and Medicaid," *New York Times,* February 24, 2003, p. A12.

13. Patricia Ruggles *(Drawing the Line: Alternative Poverty Measures and Their Implications for Public Policy* [Washington, D.C.: Urban Institute Press, 1990], chap. 3, esp. p. 53, table 3.3) takes the story up through the late 1980s. Using data for 1955, then the latest available, the person who formulated what became the poverty line, Mollie Orshansky, found that the average family spent approximately one-third of its annual income on food. The Department of Agriculture had calculated the lowest amount families of different sizes and composition had to spend to reach minimum nutritional adequacy. Essentially, Orshansky took those minimal food budgets and multiplied them by three (the reciprocal of the cost of food as a proportion of the average family budget) in order to arrive at the measured poverty line. Employing the same procedure that Orshansky used but starting with data from 1987 instead of 1955, Ruggles (p. 53, table 3.3) found that the poverty line would be 165 percent of the official measure. Doing the same for 2000 would bring the poverty line to more than 170 percent of the official measure. That percentage results mainly because the cost of food now constitutes only about one-sixth of the average family's budget in contrast to one-third of the average family's budget back in 1955.

The National Research Council also recalculated the poverty line by updating the multiplier, reaching the conclusion that the updated poverty line for 1991 would be about 150 percent of the official threshold. (See National Research Council, Constance F. Citro and Robert T. Michael, eds., *Measuring Poverty: A New Approach* [Washington, D.C.: National Academy Press, 1995], pp. 110–12, including table 2–1.) Adjusting for the change in the multiplier since 1991 would raise the updated poverty line to approximately 160 percent of the official threshold for 2001.

14. In the mid-1990s, for example, when the Roper Center asked: "How much money would you say you and your family need each year just to get by" (as opposed to "in order to live in reasonable comfort" or "to fulfill all your dreams"), a national sample of respondents answered that it took approximately $25,000 a year, which was 160 percent of the official poverty line at the time. (See *Public Perspective* 6 [November/December 1994], p.

98.) Gallup finds much the same when it asks respondents: "What is the smallest amount of money a family of four needs . . . to get along in this community?" (See National Research Council, Citro and Michaels, eds., *Measuring Poverty,* pp. 138–39, table 2–4.) Americans respond with a lower income (about 120 percent of the official poverty line) when asked what constitutes a poverty income, but poverty, of course, has no referent here, unlike in the questions posed by Roper and Gallup.

15. For the experience of low-income households, see text at notes 53 and 54 in this chapter and the notes themselves.

16. See note 14 of this chapter.

17. For evidence, see text surrounding notes 53 and 54 in this chapter and the notes themselves. For opinion surveys of Americans, see note 14 of this chapter.

18. Adequate employment assumes one and two-thirds full-time workers for a family with two adults and children rather than two full-time workers. The reason is that the costs related to after-school child-care arrangements, even if paid child care is needed only a few days a week, generally make low-wage full-time employment for a second earner uneconomic. One and two-thirds full-time workers would be employed for 3,350 hours. At $9.05 per hour, that employment would provide approximately $30,300, the intended poverty line for a family of four.

For how an adequate wage applies to households of different compositions and sizes, including single-person households, and for different areas of the nation with different costs of living, see John E. Schwarz, *Illusions of Opportunity: The American Dream in Question* (New York: W. W. Norton, 1997), pp. 66–67 and notes 27–29, and p. 64, note 17.

19. Lawrence Mishel et al. (*The State of Working America, 2002–03* [Ithaca, N.Y.: Cornell University Press, 2003, advance-proofs copy], p. 120, table 2.3) report the average earnings per hour in 2001 as $17.18. A wage of $9.00 per hour is 52 percent of that wage.

20. The Council of Economic Advisers (*Economic Indicators,* September 2002, p. 15) reports the average hourly earnings of production workers in 2001 as $14.32. A wage of $9.00 per hour is 63 percent of that wage.

21. Schwarz, *Illusions of Opportunity,* pp. 66, 68, and accompanying notes. The wage assumes that there will be two workers in families containing two working-age adults. For more information on issues concerning an adequate living and wage in relation to the needs of families of different sizes as well as costs of living for different areas of the nation, see ibid., pp. 66–67 and notes 17 and 27–29 of that same chapter.

22. Ibid., pp. 72–74. The focus for thinking about an adequate job (of which every household needs at least one) is on a full-time job for the primary worker, not part-time jobs. One reason is that, when trying to piece together two or more part-time jobs, it can be very difficult to assure that the schedules for those jobs will remain aligned so that the worker can continue in them and work full hours. Part-time jobs are particularly vulnerable to sudden schedule changes and irregular hours. Moreover, about half of all part-time jobs pay below an adequate hourly wage. Even more offer no benefits. The chance is low that a worker occupying a year-round full-time job paying below an adequate hourly wage will find two or more part-time jobs each paying above an adequate wage, let alone that he or she will also be able to coordinate the schedules for those jobs for any length of time. Perhaps for these reasons, fewer than 6 percent of all workers actually do hold down two jobs at the same time, and less than half of those piece together two part-time jobs. See U.S. Bureau of the Census, *Statistical Abstract of the United States, 2001* (Washington, D.C.: GPO, 2001), p. 377, table 586. (In 2000, approximately 1,595,000 workers held two

part-time jobs, and another 1,429,000 workers held two jobs with the hours varying for either the primary or the secondary job. The combined total of 3 million workers comes to 2.2 percent of all workers that year.)

23. Schwarz, *Illusions of Opportunity,* pp. 73–77.

24. In 1989, there were 6.5 million unemployed workers, 4.7 million workers employed part-time because they could not find full-time jobs, and 13.1 million workers employed in year-round full-time jobs with earnings below a minimally adequate wage. This comes to 24.3 million workers out of a labor force of 123.9 million workers, or 19.6 percent. The number of unemployed workers in part-time jobs unable to find satisfactory full-time employment (workers classified as "part-time for economic reasons") can be found yearly through 2002 in the Council of Economic Advisers, *Economic Indicators* (Washington, D.C.: GPO), in the employment section during the year subsequent to the one in question. Those employed in year-round full-time jobs at pay below an adequate wage are calculated from data in the Panel Survey on Income Dynamics for 1989 checked against the Current Population Survey for population estimates. For a similar result regarding low-paid year-round full-time workers in 1989, see U.S. Department of the Census, *Workers with Low Wages, 1964–1990,* Current Population Reports, Series P-60, no. 178 (March 1992), p. 25, table 4.

25. Chapters 4 and 5 of Schwarz, *Illusions of Opportunity,* provide detailed evidence of a net deficit of 15.7 million in the supply of jobs able to support a minimally decent living relative to the households and workers in the economy needing them, leaving too few jobs paying a minimally adequate wage for 23 percent of all nonretired households.

26. In 1999, there were 5.9 million workers unemployed, 3.2 million employed part-time who could not find full-time jobs, and 14.1 million employed year-round full-time in jobs with earnings below a minimally adequate wage. The total of 23.2 million workers comes to 16.6 percent of the 139.4 million workers in the labor force. For sources, see note 24 above. Figures on year-round full-time workers with earnings below a minimally adequate wage for 1999 are estimated from data in the Current Population Survey for that year. See also Gordon Lafer, *The Job Training Charade* (Ithaca: Cornell, 2002), pp. 19–44.

27. From 1947 to 1965, the net growth of the civilian labor force averaged less than 1 million workers per year (the numbers of workers rose from 59.4 million in 1947 to 74.5 million in 1965). That abruptly changed in the early 1960s. During the following twenty years, labor force growth averaged slightly more than 2 million workers per year (from 74.5 million in 1965 to 115.5 million in 1985). With respect to immigration alone, the estimate of a respected analyst is that the rise in legal immigration caused nearly half of the decline that occurred in the relative wage for high school dropouts following the 1960s. See George J. Borjas, *Heaven's Door: Immigration Policy and the American Economy* (Princeton, N.J.: Princeton University Press, 1999).

28. Mishel et al., *State of Working America, 2002–03,* p. 126, table 2.6, and p. 155, fig. 2L.

29. Economist Gary Becker ("The Age of Human Capital," in Edward P. Lazear, ed., *Education in the Twenty-first Century* [Stanford, Calif.: Hoover Institution Press, 2001], p. 3) estimates that human capital (the education, skills, information, and ideas of workers), as opposed to items such as factories and machinery, amounts to more than 70 percent of total productive capital in today's economy. Over the past half century in manufacturing, in line with Becker's estimate, the productivity of workers has far outpaced the productivity growth that can be attributed to capital and other factors. (U.S. Bureau of Labor

Statistics, "Multifactor Productivity Trends in Manufacturing, 2000," August 29, 2002, table 1, www.bls.gov/mfp.) An improvement in performance averaging merely 1.1 percent annually per worker, coming simply as a result of workers' own added experience and knowledge on the job over a year, would *by itself* account for about 70 percent of the total growth that took place in workers' productivity from 1973 to 2001 in the general economy.

Let us say, though, that rather than Becker's 70 percent, approximately 50 percent of improved worker productivity comes from the workers through their greater experience and knowledge on the job over the years coupled with the increased skill levels workers gain through training. The remaining 50 percent of improved productivity comes from the effects of capital and other factors.

How well have American workers fared since the early 1970s? Between 1973 and 2001, the productivity of American workers grew by about 54 percent, whereas real compensation for the median worker—the worker exactly in the middle—rose by 8 percent (see Mishel et al., *State of Working America, 2002–03,* p. 155, fig. 2L). Half (the portion labor contributes apart from capital) of that productivity improvement comes to 27 percent, or 19 percent greater than the 8 percent actual rise in real compensation to the median worker from 1973 to 2001. How much is that worth? In 2001, the wage ($12.87) and benefit ($3.82) for the median worker was $16.69 per hour (see Mishel et al., *State of Working America, 2002–03,* p. 126, table 2.6, for wages, and p. 118, table 2.2, for benefits). Had compensation been 19 percent higher, in line with the contribution of workers' improved productivity, it would have amounted in 2001 to approximately $3.17 per hour, or $6,400 more per year for a full-time worker.

30. From 2001 to December 2003, the gap between productivity improvement (13.7 percent) and real compensation per hour for workers (2.5 percent) had widened by another 4.3 percent (adjusted for the contribution of capital and other factors) when compared with 2001. (For the 2001 and fourth quarter 2003 figures for productivity and real compensation, see Council of Economic Advisers, *Economic Indicators*, February 2004, p. 16.) On median wages and benefits together of about $17.00 per hour for the total hours an average family with children works (approximately 3,450 hours annually), that 4.3 percent enlarged gap comes to $2,520 in yearly compensation in addition to the gap of $11,000 that existed in 2001, bringing the overall gap above $13,000.

31. For example, productivity per hour for all workers rose by about 37 percent between 1973 and 1995, whereas *average* real compensation per hour for all workers rose about 20 percent (median real compensation did not rise at all over those years). This 20 percent growth of average real compensation exceeds by about 2 percent the appropriate proportional rise in compensation relative to productivity meeting the benchmark employed to adjust for the contribution of capital and other factors (see above, note 29). For productivity and compensation figures over the period, see Mishel et al., *State of Working America, 2002–03,* p. 155, fig. 2L.

32. For example, see Lawrence F. Katz and Kevin M. Murphy, "Changes in Relative Wages: Supply and Demand Factors," *Quarterly Journal of Economics* 107, no. 2 (1992), pp. 35–78, and Chinhui Juhn et al., "Wage Inequality and the Rise in Returns to Skill," *Journal of Political Economy* 101, no. 3 (June 1993), pp. 410–42.

33. See Chapter 9, note 13, for evidence on how narrowly focused the gains were. Despite the substantial gains for those at the very top shown in that note, the experience of college-educated workers as a group was very different. The pay increase for college-

educated workers generally failed to keep pace with the improvement in workers' productivity attributable to labor (for the latter, see note 29, above). In order to keep pace with productivity improvement attributable to labor, the overall real pay increase needed to have been approximately 27 percent from 1973 to 2001; instead, the real pay of workers who had college degrees rose by less than 16 percent in those years. See Mishel et al., *State of Working America, 2002-03,* p. 157, table 2.17. The top 1 percent of earners' real income, by sharp contrast, advanced by nearly threefold from 1979 to 1997 alone. See Mishel et al, *State of Working America, 2002–03,* p. 69, table 1.17.

34. In 2000, about 520,000 workers between age fifty-five and sixty-four were downsized or displaced—see U.S. Bureau of the Census, *Statistical Abstract of the United States, 2002* (Washington, D.C.: GPO, 2002), p. 380, table 585; the number of employed workers in this age group in the labor force was about 13.6 million (ibid., p. 374, table 573). About 3.8 percent of employed workers aged fifty-five to sixty-four, therefore, were downsized or displaced in the single year. If they are representative, such figures would add up to the displacement or downsizing of nearly half the jobs of workers in this age group over a ten-year period. For the 110 million employed workers from ages twenty through fifty-four, about 2.6 million, or 2.4 percent, were downsized or displaced in 2000. Earlier in the recovery, in 1992, the number of persons between age fifty-five and sixty-four downsized or displaced was still greater, hitting about 6.6 percent in 1992, in comparison with 4.3 percent for workers between the ages of twenty and fifty-four. Calculated from U.S. Bureau of the Census, *Statistical Abstract of the United States, 1996* (Washington, D.C.: GPO, 1996), p. 401, table 628, and p. 404, table 635.

It is important to note that overall unemployment rates do not accurately reflect the experience of older Americans in the economy because their participation in the labor market rises and falls with the business cycle by a larger fraction than is the case for young and middle-aged Americans.

35. See previous note.

36. Bill Repp, "Working Smart," *Arizona Daily Star,* January 17, 2002, p. D2. Repp's main suggestion is for displaced workers to start their own businesses, but, even here, he cautions: "You'd better have your own product, because clients tend to discriminate against over-40 contract workers as well."

37. John W. Fountain, "Age Counts in Hiring, the Older Jobless Find," *New York Times,* November 13, 2002, p. A16.

38. See, for example, W. Michael Cox and Richard Alm, "By Your Own Bootstraps: Economic Opportunity and the Dynamics of Income Distribution," *Federal Reserve Bank of Dallas Annual Report,* 1995, p. 8, exhibit 4. Their analysis shows that only 5.1 percent of individual Americans age sixteen and older who began in the lowest income quintile in 1975 were still there in 1991. Families, however, appear to have a very different experience. For example, Lawrence Mishel and his coauthors find that 61 percent of families that started in the lowest income quintile in 1979 remained there in 1989; over a longer period, from 1969 to 1994, 41 percent of families who started off in the lowest income quintile in 1969 still were there in 1994. See Lawrence Mishel et al., *The State of Working America, 1998–99* (Ithaca, N.Y.: Cornell University Press, 1999), pp. 87–88, tables 1.23 and 1.24, and others cited in note 55 of this chapter.

39. That the lowest-quintile individuals in the Cox and Alm study ("By Your Own Bootstraps") had an average income of barely $1,000 per year in 1975 (in 1993 dollars)—the first year of their study (p.8, exhibit 5)—suggests that hardly any of them were work-

ing full-time during that first year. An individual working full-time and making the minimum wage in 1975 would have been earning about $10,000 in 1993 dollars over the year.

40. Mishel et al., *State of Working America, 2002–03,* p. 126, table 2.6. The real wage for these workers fell by about 7 percent on average from 1979 to 1989.

41. Schwarz, *Illusions of Opportunity,* pp. 76–77, from data contained in the Panel Survey of Income Dynamics adjusted to the population and employment estimates of the Bureau of Census's Current Population Survey.

42. Ibid., p. 188, note 14. For household heads (with children) who had a high school degree and also some college education (but not a college degree), 62 percent who started in 1979 in a low-wage job had failed to move up to a decent-paying job in 1989. It is relevant to add that of all workers who held low-paying year-round full-time jobs in 1989, more than one-third of them had completed at least one year of college education. Frederick L. Pryor and David L. Schaffer (*Who's Not Working and Why: Cognitive Skills, Wages, and the Changing U.S. Labor Market* [Cambridge: Cambridge University Press, 1999]) show the cascading downward effect on wages of a mushrooming supply of college-educated workers, as accompanied the large baby boom generation's entry into the labor market.

43. See the results from the analysis of the mobility of workers out of low-wage employment through 1994, following a decade or more of employment, in Annette Bernhardt et al., *Divergent Paths: Economic Mobility in the New American Labor Market* (New York: Russell Sage Foundation, 2001), pp. 152–58.

44. G. A. Cohen ("Capitalism, Freedom, and the Proletariat," in Alan Ryan, ed., *The Idea of Freedom: Essays in Honour of Isaiah Berlin* [Oxford: Oxford University Press, 1979], pp. 9–25) offers an analogous idea that he calls "contingent freedom." Contingent freedom occurs when an individual is free in the sense of facing no delimiting external interference but only on the condition that others do not attempt to exercise their rightful freedom. Cohen says that in a situation of contingent freedom, when everyone does exercise their freedom, there is a "great deal of unfreedom in the group" (p. 24), and he likens this condition, in effect, to being "imprisoned" (p. 24).

45. For a series of personal examples and individual histories, see Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* (New York: Holt, 2001), and John E. Schwarz and Thomas J. Volgy, *The Forgotten Americans: Thirty Million Working Poor in the Land of Opportunity* (New York: W. W. Norton, 1992), pp. 16–31, 53–61, and 95–100.

46. Christopher Jencks, Susan E. Mayer, and Joseph Swingle, "Who Has Benefited from Economic Growth in the United States since 1969? The Case of Children," April 2002, mimeo, p. 30, table 5, and p. 34, table 9, figures for middle-income families. The data for families are for families containing children; forthcoming in Edward N. Wolff, *What Has Happened to the Quality of Life in Advanced Industrial Nations* (Northampton, Mass.: Edgar Elgar).

47. Regarding households with children living in crowded conditions, for example, those in the lowest-income quintile residing in crowded conditions (more than one person per room) dropped from 38 percent to 18.2 percent between 1973 and 1999. See ibid., p. 29, table 5.

48. See ibid. and p. 35, table 11.

49. Mishel et al., *State of Working America, 2002–03,* p. 97, table 1.27, and p. 101, table 1.29, for the years 1979–95.

50. Jencks, Mayer, and Swingle, "Who Has Benefited from Economic Growth," p. 26, table 2, from 1979 to 1999. The income growth in the middle-quintile family, per person, was $2,000 from 1979 to 1999, amounting to $8,000 for a family of four.

51. In order to remain morally defensible within its own reasoning, as shown in Chapter 2, liberty calls for individuals to receive the fruits of their labor along with the opportunity to improve their living by improving their work. Earlier in this chapter (see the text surrounding notes 28 to 33 in Chapter 3 and the notes themselves), I examined and applied this principle within the context of the contemporary American economic experience.

52. Mishel et al., *State of Working America, 2002–03,* p. 97 and p. 101, tables 1.27 and 1.29. For families in the bottom quintile, their total work hours rose by 11 percent from 1979 to 1995, whereas their real income fell by 3 percent.

53. For 1999, see U.S. Department of Labor, Bureau of Labor Statistics, *Consumer Expenditures in 1999,* Report 949 (May 2001), table 1. It shows that the average consumer unit in the bottom quintile of the income ladder contained 1.8 individuals (the median unit, overall, contained 2.5 individuals) and had an annual income of $7,264 and expenditures of $16,750. In 1999, the official poverty line for 1.8 individuals would have been approximately $9,810 (90 percent of a two-person household). Expenditures of $16,750 come to 171 percent of the official poverty line of $9,810. For 1973, see U.S. Department of Labor, Bureau of Labor Statistics, *Consumer Expenditure Survey Series: 1972–73,* Report 455–4 (1977), table 3. The lowest-income units spent $4,003. This amounts to 12 percent less in real dollars than the $16,750 the lowest-income units spent in 1999.

54. In 1972–73. the lowest-income units (the bottom 5 percent of families) spent $4,003 and had 2.7 individuals per unit (ibid., table 3). The 1972–73 poverty line for a household with 2.7 individuals would have been approximately $3,130. Thus, the lowest-income units spent around 128 percent of the poverty line. Had its multiplier been duly updated (making it the intended poverty line), this is about what the official poverty line would have required. See Ruggles, *Drawing the Line,* p. 5.3, table 3.3, who shows that the poverty line with an updated multiplier would have been 127 percent of the official poverty line in 1972–73.

55. Peter Gottschalk and Sheldon Danziger, "Family Income Mobility: How Much Is There?," *Focus* (Summer/Fall 1998), pp. 20–24; Robert Perrucci and Earl Wysong, *The New Class Society: Goodbye American Dream?* (New York: Rowman and Littlefield, 2002); Mishel et al., *State of Working America, 1998-99,* pp. 368–69, table 8.10, and pp. 378–79, table 8.16 and fig. 8E; and Mishel et al., *State of Working America, 2002–03,* p. 418, table 7.13.

56. Mishel et al., *State of Working America, 1998–99,* p. 368, fig. 8B.

57. Calculated from Mishel et al., *State of Working America, 2002–03,* pp. 403, 405, tables 7.4 and 7.5.

58. See Chapter 2 for the logical connection between decent economic opportunity and freedom in order for freedom to be morally sustainable in its own terms, as well as the reflection of this same thinking in the views of the Founders. For Lincoln, freedom implied the right of individuals to the fruits of their own labor and to a genuine chance at comfort and prosperity through work and perseverance. Access to that level of opportunity was necessary for individuals to have a true sense of hope. See Andrew Delbanco, *The Real American Dream* (Cambridge: Harvard University Press, 1999), pp. 74–77. Those rights to the fruits of one's labor and to a dignified level of comfort through sustained work, in turn, are similar to the right to decent economic opportunity contained in what

I call genuine freedom and distinguish from the far lesser right of opportunity understood in free-market freedom.

FOUR: Education, Social Security, and Welfare Assistance

1. Apart from reasons of economic opportunity, an effective basic education is necessary to exercise one's political and legal rights as an equal citizen, explored in Chapter 8.

2. Consistent with the reasoning of liberty, I define the opportunity for a sound basic education today as the opportunity for a child within the normal range of aptitude to attain a level of skills and knowledge sufficient at least to be able to gain entry into and have the competency to start and succeed in postsecondary education if he or she chooses, along with the economic ability to pursue that further education. Attaining an effective high school education sufficient at least to begin postsecondary education is, plausibly, a prerequisite to entry into a majority of all jobs that pay an adequate wage. Access to the same level of educational opportunity is necessary also to fulfill other purposes an effective basic education serves under liberty, such as the ability to exercise one's political and legal rights as an equal citizen.

3. See prior note for the definition of an effective or sound basic education. I confine myself in the pages to come to concerns about coerciveness relating to the opportunity for an effective basic education, not regarding the organized activities that may (or may not) take place at school or concerning the content of the curriculum. With respect to the last aspect, though, a simple rule of thumb is that the curriculum provided through any publicly run institution must remain strictly neutral with respect to religion. For a public institution to favor one religion over another as a matter of curricular policy, or religion itself over nonbelief, or the reverse, would violate the principle of liberty that the state be and remain neutral with respect to matters of individual conscience. I have more to say later about the issue of vouchers as it applies to religious schools.

4. Jacques Steinberg, "For-Profit School Venture Has Yet to Turn a Profit," *New York Times,* April 8, 2002, p. A16. Steinberg writes: "Edison officials said that on average the company operated its schools using only 84 cents of every dollar that the districts would spend. But, the officials said, the company has yet to make a profit because the costs of managing its own headquarters, performing educational research and making capital purchases—it installs a computer in the home of most students—have pushed its costs per student above those of the districts it serves." See also Rebecca Winters, "Trouble for School Inc.," *Time,* May 27, 2002, p. 53.

5. In July 2003, Whittle and a partner decided to take Edison Schools private, paying $1.76 per share for the publicly held stock. The company had started at $18 per share when it went public in 1999. See Diana B. Henriques, "Edison Schools' Founder to Take It Private," *New York Times,* July 15, 2003, p. C9.

6. For international test outcomes by students' level of income, see Gerald W. Bracey, "The Assessor Assessed," *Journal of Educational Research* 88 (January/February 1995), pp. 137–40, and Gerald W. Bracey, "The Fourth Bracey Report on the Condition of Public Education in the United States," *Phi Deltan Kappan* 76 (October 1994), pp. 115–27. As Bracey reports in the latter citation, the Second International Assessment of Educational Progress in mathematics, transformed into National Assessment of Educational Progress scales, found in 1992 that advantaged urban American students scored 283 and all white American students across the nation scored 277. Those scores were similar to results for

the highest-scoring nations (Taiwan, 285, and Korea, 283). By contrast, disadvantaged urban American students (239) and black American students (236) scored lower than the lowest-scoring nation, Jordan, with a score of 246. Similar results from a variety of international reading, math, and science tests again in 1999–2000 are shown in Gerald W. Bracey, *What You Should Know about the War against America's Public Schools* (Boston: Allyn and Bacon, 2003), pp. 57–58, tables 5.6 and 5.7. Regarding educational differences, see also W. Wayt Gibbs and Douglas Fox, "The False Crisis in Science Education," *Scientific American,* October 1999, pp. 87–92. Note, too, that the education of poor children may require a higher level of spending per pupil than is the case for children from other income levels. See the text of this chapter in the paragraph leading to note 12 and the note itself.

7. For example, schools in poor areas must do with math teachers who neither majored nor minored in math-related fields at double the rates of other schools. That gives one hint of the difference. See Richard M. Ingersoll, "The Problem of Underqualified Teachers in American Secondary Schools," *Educational Researcher* 28 (March 1999), pp. 26–37. Journalist Michael Winerip ("A Test for Schwarzenegger: Adding Muscle to Bare Bones," *New York Times,* November 5, 2003, p. A21) reports on schools in Los Angeles where students cannot do homework in some subjects because they have no books to take home, where some students have no desks to work on in the classrooms, and where students are asked to do much of their learning from substitute teachers who are unqualified in the subjects.

8. Researchers Steve Bradley and Jim Taylor ("The Report Card on Competition in Schools," Adam Smith Institute, London, 2002) find that competition among secondary schools in Great Britain since 1988 has improved exam performance generally but that students in poverty still continue to do poorly (pp. 17–18). Moreover, competition led the better schools to *reduce* their proportion of students from low-income families (p. 16). Edward B. Fiske and Helen Ladd (*When Schools Compete: A Cautionary Tale* [Washington, D.C.: Brookings Institution, 2000]) examine school choice in which students are permitted to seek to enroll in any public school and are no longer guaranteed a place in their local neighborhood school. Even in this case, though, the schools themselves were given no option except to admit all students who applied unless the school had no more room.

9. Diana Jean Schemo, "Officials Say School Choice Often Just Isn't an Option," *New York Times,* December 22, 2001, p. A11.

10. About 30 percent of American students live in poor families by international measures as well as by the intended poverty line. If private schools *doubled* their size and also gave fully half of the places to students from poor families, it would open space for about one-sixth of these students. It is important to add that no firm evidence exists showing that the test scores of students using vouchers differ significantly from those of equivalent students who remain in the public schools. The reported results from many different studies, so far, are quite mixed (see, for example, Helen F. Ladd, "School Vouchers: A Critical View," *Journal of Economic Perspectives* 16, no. 4 [Fall 2002], pp. 3–24, who surveys the results of numerous programs in the United States and globally). For a critique of one of the largest studies to conclude that vouchers have a positive effect, see Michael Winerup, "What a Voucher Study Truly Showed and Why," *New York Times,* May 7, 2003, p. A27.

11. *Assuring* an effective public alternative, of course, may well require overriding school district boundaries as well as figuring out how to avoid the deterioration of the receiving schools from overcrowding and other such problems.

12. A study from the Heritage Foundation found that public schools in low-income areas can succeed but that success in those schools generally requires excellent rather than average leadership from principals, including the principals' ability to find and successfully recruit the best teachers. This is to say that although average leadership can lead to school success in most public schools, it is unlikely to do so in low-income locales. If excellent principals and teachers are more costly than average principals and teachers, *it follows that greater spending must occur in low-income schools than in other schools in order to attain the same level of success*. See Samuel Casey Carter, *No Excuses: Lessons From 21 High-Poverty Schools* (Washington, D.C.: Heritage Foundation, 2000). This is not to mention the probability that low-income schools require smaller class sizes and a wider array of specialists.

13. Greg Winter, "College Loans Rise, Swamping Graduates' Dreams," *New York Times,* January 28, 2003, pp. A1, A16.

14. U.S. Bureau of the Census, *Statistical Abstract of the United States, 1996* (Washington, D.C.: GPO, 1996), p. 377, table 588 and Lawrence Mishel et al., *The State of Working America, 1998–99* (Ithaca, N.Y.: Cornell University Press, 1999), p. 147, table 3.16, and p. 246, table 4.16.

15. The Dow Jones Industrial Average stood at 911 in 1965 and at 885 in 1982, but consumer prices had nearly tripled in the interim.

16. Kate Zernike, "Stock Slide Shatters Retirement Dreams," *Denver Post,* July 14, 2002, p. 18A.

17. For a discussion of the financial future of Social Security and vastly different estimates of future deficits, see President's Commission to Strengthen Social Security, *Strengthening Social Security and Creating Personal Wealth for Americans,* December 2001, www.govreform.org/Final_report.pdf; Dean Baker and Mark Weisbrot, *Social Security: The Phony Crisis* (Chicago: University of Chicago Press, 1999); and Joseph White, *False Alarm: Why the Greatest Threat to Social Security and Medicare Is the Campaign to "Save" Them* (Baltimore: Johns Hopkins University Press, 2001).

18. John Nordheimer, "Welfare-to-Work Plans Show Success Is Difficult to Achieve," *New York Times,* September 1, 1996, p. 10.

19. See Kathryn Edin and Laura Lein, *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work* (New York: Russell Sage Foundation, 1997), esp. p. 150, table 6.1, and Christopher Jencks and Kathryn Edin, "The Real Welfare Problem," *American Prospect* 1 (Spring 1990), pp. 31–50.

20. Jason De Parle, "When Giving Up Welfare for a Job Just Doesn't Pay," *New York Times,* July 8, 1992, pp. A1, 15. The "success" of most welfare recipients through work has been similar to Linda Baldwin's. Quite a few have been unable to reach the official poverty line let alone the intended poverty line. See below, notes 21–22.

21. See the results of Thomas Brock et al., *Welfare Reform in Cleveland: Summary Report* (New York: Manpower Demonstration Research Corporation, 2002), and the the section in this chapter titled "Government Social Assistance Fosters Poverty."

22. For a summary of the findings in the general literature about the poverty status of former welfare recipients, see Roberta M. Blank, "Evaluating Welfare Reform in the United States," *Journal of Economic Literature* 50 (December 2002), esp. pp. 1142–45, and Benjamin I. Page and James R. Simmons, *What Can Government Do: Dealing with Poverty and Inequality* (Chicago: University of Chicago Press, 2000), pp. 279–81. See also Pamela Loprest, "Families Who Left Welfare," Discussion Paper 99–02, The Urban Institute, Washington, D.C., 1999. The Joyce Foundation found in 2002 that approximately half of

former welfare recipients were unable at times to pay basic bills for themselves and their children for food, utilities, and rent.

23. See Chapter 9, section titled "Policy Solutions."

24. Quoted in Matt Bai, "Fight Club," *New York Times Magazine,* August 10, 2003, p. 26.

25. In 1999, about 44 million out of the total of 134 million American workers who were employed were either in year-round full-time jobs paying below an adequate wage or were in part-time or part-year work. Chapter 3, note 22, spells out the limitations of part-time jobs as a foundation for meeting adequate opportunity for the prime earner in households.

26. Job creation at the rate of 2.5 million net new jobs annually would produce just over 1.6 million net new adequate jobs annually—about 500,000 more each year than additional demand requires, totaling about 5 million more than required over the entire decade. In addition, if real wages for the bottom one-fifth of workers rose by 20 percent, that would generate approximately another 6 million adequate jobs, resulting altogether in 11 million additional adequate jobs beyond new demand over the ten years. Nearly 3 million of those jobs would offer no health insurance benefits, resulting in a net gain of 8 million jobs. That is, a record performance from the economy for ten years in succession would resolve the situations for only about one-third of the 23 million distressed workers in 1999, this before the economic slowdown and recession hit the nation from 2000 to 2003. And, the figures have yet to include new immigrants entering the labor force.

27. The classic statement of this position is Charles Murray, *Losing Ground: American Social Policy, 1950–1980* (New York: Basic Books, 1984).

28. See Brock et al., *Welfare Reform in Cleveland,* pp. 7, 17 (fig. 4), and 29.

29. See Blank, "Evaluating Welfare Reform in the United States," pp. 1142–44.

30. For an examination of deleterious procedures for implementing welfare in comparison with other benefit programs, and their impact on recipients, see Joe Soss, "Lessons of Welfare: Policy Design, Political Learning, and Political Action," *American Political Science Review* 93 (June 1999), pp. 363–80. See also John Gilliam, *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy* (Chicago: University of Chicago Press, 2001).

31. For the empirical link between the earned-income tax subsidy to wages as a form of public assistance and increased employment, see Bruce D. Meyer and Dan T. Rosenbaum, "Welfare, the Earned Income Tax Credit, and the Labor Supply of Single Mothers," mimeo, Northwestern University, March 31, 1998.

32. The effects of the failure of policies to honor the obligations are widespread. For just one example, the gulf between the average productivity improvement of workers and the real compensation growth for the median worker has widened significantly over the past three decades, as we have seen, contrary to morally sustainable strictures of freedom. A majority of all Americans have suffered from this growing gap, profoundly so. See Chapter 3, the paragraphs containing notes 28–33 and the notes themselves, and also Chapter 9.

FIVE: Freedom and Our Protection from Wrongful Harm

1. Numerous examples of these kinds of governmental decisions are described in Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (New York: Random House, 1995).

2. Elizabeth Becker, "Parents of Sickened Children Ask for Tighter Food Rules," *New York Times,* October 17, 2002, p. A18.

3. Philip K. Howard, "Facing the Limits of the Law," *New York Times,* September 9, 2002, p. A27.

4. George Will, "Lawsuit Culture Cripples America," *Arizona Daily Star,* June 3, 2002, p. B5.

5. An obvious issue concerning *punitive* as opposed to compensatory damages is that, though they must be big enough to be punitive so that others don't end up getting hurt, large punitive awards generally go to the private individuals involved in the suit, not to the public at large.

6. The figure includes spending in 2000 for all criminal justice law enforcement activities from the police through adjudications and incarceration at the federal ($28 billion) and state and local levels ($106 billion). See U.S. Census Bureau, *Statistical Abstract of the United States, 2003* (Washington, D.C.: GPO, 2003), p. 324, table 479, and p. 290, table 447.

7. Based on Murray L. Weidenbaum, "The Costs of Government Regulation of Business," U.S. Congress, Joint Economic Committee, 95th Cong., 2nd sess., April 10, 1978, who calculates the administrative costs at 5 percent of compliance costs. Using Weidenbaum's formula for administrative costs and working from estimates of compliance costs from other experts (see the next note), the bureaucratic costs of regulation would amount to from $35 billion to $70 billion annually if compliance costs at the state and local levels equal estimated costs to comply with federal regulations.

8. For federal regulation alone, Pietro S. Nivola ("The New Pork Barrel," *Brookings Review* 16 [Winter 1998], pp. 6–9) estimated that compliance costs totaled about $700 billion annually in the mid-1990s. Robert W. Hahn ("The Costs and Benefits of Regulation: Review and Synthesis," *Yale Journal on Regulation* 8 [1991], pp. 233–78) calculates such costs at about $130 billion annually through 1988 for the broad array of regulations covered, and (in Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* [New York: Oxford University Press, 1996], p. 218) he calculates that an additional $220 billion in annual costs were added from 1990 to 1995. The compliance costs for state and local regulations are presumed at least to equal the costs to comply with federal regulation.

9. Tammy O. Tengs and John D. Graham, "The Opportunity Costs of Haphazard Social Investments in Life-Saving," in Hahn, *Risks, Costs, and Lives Saved,* p. 172.

10. Tengs and Graham (ibid., pp. 177–78) refer to W. Kip Viscusi's finding on the value placed on a life in studies. See W. Kip Viscusi, "The Value of Risks to Life and Health," *Journal of Economic Literature* 31 (December 1993), pp. 1912–46, who estimates the value placed on a life at about $5 million ($3 million to $7 million). That comes to $67,000 per year if simply divided over seventy-five years of life and perhaps to significantly more (see Tengs and Graham, "Opportunity Costs," p. 178, who suggest "a few hundred thousand dollars per life-year").

11. Robert W. Hahn and John A. Hird, "The Costs and Benefits of Regulation: Review and Synthesis," *Yale Journal on Regulation* 8 (1991), pp. 233–78. The review examined regulations concerning equal opportunity and other non-health-related regulations together with health-related regulations. The examination concluded (p. 253) that the regulations then in effect (through the 1980s) were roughly comparable in overall costs and benefits, possibly involving a very small greater cost than benefit amounting to less than 1 percent of the GNP.

12. See Robert W. Hahn, "Regulatory Reform: What Do the Government's Numbers Tell Us?," in Hahn, *Risks, Costs, and Lives Saved,* pp. 208–53.

13. Hahn, *Risks, Costs, and Lives Saved,* p. 218, table 10.4.

14. Tengs and Graham, "Opportunity Costs," p. 167.

15. Derek Bok, *The Trouble with Government* (Cambridge: Harvard University Press, 2001), p. 151.

16. Katharine Q. Seelye, "Study Sees 6,000 Deaths from Power Plants," *New York Times,* April 18, 2002, p. A21.

17. Tengs and Graham, "Opportunity Costs," p. 178.

18. Costs might easily be determined to outweigh benefits in the cases, for examples, of persons who have substantial mental or physical handicaps and require costly care or persons having only few years to live whose conditions are likely to end up requiring large medical expenses. To say it differently, any time greater measured social benefits or lesser social costs exist at the expense of wrongful harm to some, cost-benefit analysis presumably will excuse that harm unless costs to liberties are somehow treated differently than other costs. Unless that is done, cost-benefit analysis will also generally excuse harm any time the perpetrator of a harm compensates the harmed, or the larger society, at the level the analyst thinks that harm is worth, whether the person harmed agrees or not or even receives the compensation (if the compensation is in the form of greater benefits or lower costs to society, for example).

19. This standard also implies, by reason, that no clear and convincing logic or evidence opposes the conclusion.

20. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 79–81.

21. Ruling in *Virginia v. Black,* 538 U.S. 343 (2003), concerning the threat likely to adhere to cross burning, Justice Sandra Day O'Connor wrote in the majority opinion: "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the *fear* of violence" (italics mine).

22. One difference between the areas involving actual physical harm and most other areas is that the former are presumed to be harmful to an individual if they occur and another is responsible for it, whereas that is not necessarily so for the latter. As a result, the former are less likely to require showing that a legitimate expectation exists, whereas that expectation often is in some question with respect to the latter.

23. For a wide range of examples, see Eric R. Claeys, "Property, Morality, and Society in Founding Legal Treatises" (paper delivered at the annual convention of the American Political Science Association, Boston, 2002).

24. For a different view, see Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980).

25. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 358.

26. It is a market failure because individual bystanders to economic exchanges and activities are made to suffer from the pollution to which those exchanges and activities give rise. They thus bear the costs and do so involuntarily, contrary to the premise of the free market. Voluntary exchanges within the market are unable to internalize those costs without some kind of external intervention.

27. For a succinct summary of the issues here, see Derek Bok, *The State of the Nation: Government and the Quest for a Better Society* (Cambridge: Harvard University Press, 1996), pp. 124–29. As Bok observes: "In the case of effluent taxes, officials find it difficult to

estimate how high the levy should be to ensure the desired reduction in pollution, or how to monitor every firm to determine the amount of 'pollution tax' that it should pay" (p. 126). There is an additional issue of equity as well—that is, sharing of the burden of correcting wrongful behavior fairly—the general problem of which I discuss in the next subsection. In the case of pollution, the question arises also as to whether the behavior itself, though wrongfully harmful to others, is properly considered a wrongful harm on the part of discrete individuals or instead only on the part of a collectivity of individuals. Is creating pollution "bad" behavior? Pollution is often an additive problem. In the case of automobile transportation, for example, each car creates pollution, but generally no single car creates harmful pollution on its own. It is the collectivity of cars that does.

28. *Whitman v. American Trucking Associations,* 531 U.S. 457 (2001).

29. The Court itself has said: "[The] dichotomy between personal liberties and property rights is a false one. . . . The right to enjoy property without deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right. . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corporation* 405 U.S. 538, 552 (1972). That the Court holds back in applying a least restrictiveness test to economic and property rights may be due partly to the belief that it is less competent in economics than in other areas of rights. See, for example, Antonin Scalia, "Economic Affairs as Human Affairs," in James A. Dorn and Henry G. Manne, eds., *Economic Liberties and the Judiciary* (Fairfax, Va.: George Mason University Press, 1987), pp. 35–36.

30. Today, the closest guiding principle to test excessiveness with respect to economic regulations may be the Court's principle that a complete taking of the value of an individual's property through economic regulation, so that the property is rendered useless or virtually useless, normally goes too far unless there is fair-market public payment for the property.

31. Dan B. Dobbs, *The Law of Torts* (St. Paul, Minn.: West Group, 2000), secs. 199 and 201.

32. *MacPherson v. Buick Motor Company,* 217 N.Y. 382, 111 N.E. 1050 (1916); prior to that the companies could be held liable for negligence only if a product was inherently dangerous to human safety. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (St. Paul, Minn.: West Publishing, 1984), pp. 682–83.

33. A market response to harm, as opposed to strict liability, results in lower sales, which does nothing in itself to compensate the individual who has been harmed. Harm dealt with through strict liability adds court awards (which hope to provide compensation) and the insurance costs to finance them as an added deterrent. Those costs, in turn, are distributed between producers and consumers through prices in the market.

34. Recall that Pietro S. Nivola ("New Pork Barrel," pp. 6–9) estimates that the overall cost of regulation at the federal level alone had reached nearly $700 billion by 1996.

SIX: Overcoming Market Failures

1. From Roy P. Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, N.J.: Rutgers University Press, 1953), vol. 2, pp. 220–21.

2. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 2.

3. Mancur Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1965), p. 14.

4. Olson, *Logic of Collective Action*; for some possible exceptions, see Elinor Ostrom, "A Behavioral Approach to Rational Choice Theory of Collective Action," *American Political Science Review* 92 (March 1998), pp. 1–22. Another very different example of a collective good involves the closed union shop. If higher wages come about because of union bargaining, workers who do not join the union and pay dues may still obtain some or all of the benefits without bearing the cost of the union. Some states protect closed union shops, partly for this reason; others regulate against them.

5. Kenneth Arrow ("Economics of Welfare and the Allocation of Resources for Invention," in National Bureau of Economic Research, *The Rate and Direction of Inventive Activity* [Princeton, N.J.: Princeton University Press, 1962]) points out how and why basic research is produced at suboptimal levels through the free market. See also Alfonso Gambardella, *Science and Innovation* (Cambridge: Cambridge University Press, 1995). Arthur M. Diamond Jr. ("Does Federal Funding 'Crowd In' Private Funding of Science?," *Contemporary Economic Policy* 17 [October 1999], pp. 423–32) shows that federal support of basic scientific research does not reduce the level of private nonprofit and industry funding. Private funding comes to about 30 percent of federal support (p. 426, table 1, and p. 428, table 3).

6. See the section "Innovation in the Economy" in this chapter.

7. Expenditures in 2000 for national defense ($295 billion), international affairs ($11 billion, outside humanitarian aid), and veterans affairs ($47 billion) together totaled $353 billion (see U.S. Bureau of the Census, *Statistical Abstract of the United States, 2003* [Washington, D.C.: GPO, 2003], p. 324, table 479). In addition, expenditures on basic research outside defense for health, agriculture, and space came to $27 billion (ibid.).

8. In the case of the post office, for example, the handling, sorting, and delivery of literally billions of pieces of mail all going to different addresses, with daily service to and from each of these addresses, involves an enormously high fixed expense. This high fixed expense would cause competitors that divide up the market to have to charge their customers a significantly higher price than a single service is able to do.

9. Expenditures in 2000 on natural monopolies at all levels of government were $370 billion, including roads ($101 billion), fire ($23 billion), sewer ($28 billion), electricity, gas, and water ($109 billion), post office ($63 billion), half of parks, recreation, and natural resources ($25 billion), space exploration outside basic research ($9 billion), and water and air terminals ($12 billion). See U.S. Census Bureau, *Statistical Abstract of the United States, 2003* (Washington, D.C.: GPO, 2003), p. 286, table 443, for roads, fire, sewer, utilities, and—with p. 324, table 479—for parks, recreation, and natural resources (one-half of total) and for space (outside basic research); and p. 714, table 1118, for the Post Office.

10. Quoted in Anne D'Innocenzio, "Weak Holiday Season," *Arizona Daily Star,* December 29, 2002, p. D6.

11. This phenomenon is similar to the idea of a "prisoner's dilemma" problem whereby individuals, each acting on their own self-interest, will all become worse off unless they collaborate and the agreement among them is enforced.

12. How this market dynamic leads to "want, famine, and mortality" is described in Adam Smith, *The Wealth of Nations:* "But it would be otherwise in a country where the funds destined for the maintenance of labour were sensibly decaying. Every year the demand for servants and labourers would, in all the different classes of employment, be less than it had been the year before. Many who had been bred in the superior classes, not

being able to find employment, would be glad to seek it in the lowest. The lowest class, not only being overstocked with its own workmen, but with the overflowings of the other classes, the competition for employment would be so great in it, as to reduce the wages of labor to the most miserable and scanty subsistence of the labourer. Many would not be able to find employment even upon these hard terms, but would either starve, or be driven to subsistence either by begging, or by the perpetration perhaps of the greatest enormities. Want, famine, and mortality would immediately prevail in that class, and from then on extend themselves to all the superior classes." Quoted in Amartya Sen, *On Ethics and Economics* (London: Basil Blackwell, 1987), p. 26.

13. There are several other individual areas of economic activity in which the same kind of market failure occurs that has given rise to the consideration of external intervention—the production and sale of certain farm crops and the length of the workday and work year are two very diverse examples. A problem with farming in the past has has been individual farmers getting into and out of crops depending upon prior prices, such that there are periodic gluts of production that may be followed by significant shortages. Weather (very good seasons and very bad ones) adds to the problem. With products that aren't necessities, and also required in a timely way, those problems could perhaps work out in the market over time. As it is, governments here and in most other nations intervene in a variety of different ways, one aim of which is to even out and stabilize supply with demand. With respect to the length of the workday and work year, see Juliet B. Schor, *The Overworked American: The Unexpected Decline of Leisure* (New York: Basic Books, 1994), chaps. 5–6.

14. The difference is not always so great: 1983 (the beginning of the full economic cycle in the early 1980s) experienced a $208 billion deficit; by 1989 (the last full year of that economic cycle), the deficit had fallen only $55 billion ($70 billion in 2000 dollars), to $153 billion. From the start to the finish of the recovery between 1976 and 1979, the deficit declined by $33 billion ($75 billion in 2000 dollars). That figure, $33 billion, represented about 1.5 percent of our GNP at the time.

15. George F. Will, "Capitalism Needs Leash," *Arizona Daily Star,* January 17, 2002, p. B7.

16. Gambardella, *Science and Innovation,* p.8, citing E. Mansfield, "Academic Research and Industrial Innovation," *Research Policy* 20, no. 1 (1991), pp. 1–12, covering the period from 1975 to 1985; see also Adam Jaffe, "Real Effects of Academic Research," *American Economic Review* 79, no. 5 (1989), pp. 957–70.

17. Gambardella, *Science and Innovation,* p. 8.

18. Richard R. Nelson, *High Technology Policies: A Five Nation Comparison* (Washington, D.C.: American Enterprise Institute, 1984), p. 43. Just consider the various kinds of innovations (some of them listed in the next paragraph of the text) in which government played a vital role and the contributions to society, to the economy, and to government in the form of revenues connected with those innovations.

19. Ibid.

20. All these innovations depended upon governmental support in one way or another. The large majority of them stemmed from activities of the United States government, but not all of them, as, for examples, in the cases of penicillin and jet transport in which public spending or procurement in Great Britain played important roles.

21. U.S. Bureau of the Census, *Statistical Abstract of the United States, 2003,* p. 290, table 447, and p. 285, table 442 (state and local health expenditures in 2000 minus federal

grants, $111 billion); p. 360, table 540 (Medicaid expenditures, $207 billion); and p. 104, table 128 (Medicare expenditures, $224 billion). Total expenditures in these health care areas for 2000 came to $542 billion.

22. The ability to obtain health care is no different than the ability to meet other essential needs when it concerns access to basic economic opportunity, which must enable individuals to attain a minimally decent level of living, in contemporary terms, through one's efforts. The market failures described here select out of health insurance coverage high-risk individuals such as the elderly and the poor. These are precisely the kinds of situations that the continued availability of basic economic opportunity involved in the protection of individual liberty, discussed in Chapters 2–4, would require be addressed.

23. Nicolas Barr, *The Economics of the Welfare State* (London: Weidenfeld and Nicolson, 1999), pp. 289–335, p. 320 for the percentage of the GDP for the United Kingdom (6 percent) and the United States (12 percent) in 1992. The figure for the United States approached 14 percent of the GNP in 2001, amounting to a cost of nearly $5,000 per American. The United States is far from an entirely private market, of course, given Medicare, Medicaid, and state and local hospitals. However, health care is significantly more private in the United States in comparison with any other Western nation.

24. Based on a health care cost of approximately $5,000 per person in the United States (see previous note). What makes up the bill? Where is the health care dollar of the American families spent? American families of three average approximately $2,100 per year in out-of-pocket spending on medical care. In addition, a family earning $60,000 annually will expend another $900 for Medicare and about $1,500 in taxes to support other public health care expenditures. Health insurance coverage for families paid wholly or partly through employer job benefits to employees could well total another $5,000 to $7,000 annually. Finally, much of the financing for our system involves large hidden costs that we never see but are very real nevertheless. Employee benefits for health care are generally passed on to consumers in the form of higher prices for products and services. As a result, families are paying most of these medical care costs for others through the higher prices they pay when they make their daily purchases. In our nation, there is no way to avoid purchasing health care for others whether or not individuals have coverage for themselves.

25. Barr (*Economics of the Welfare State,* p. 320) observes that 26 percent of American expenditures represent administrative costs such as supervision and billing, compared with 2.9 percent in Great Britain. See also SteffieWoolhandler et al., "Costs of Health Care Administration in the United States and Canada," *New England Journal of Medicine* 349 (August 21, 2002), pp. 768–75, and the response in the same issue by Henry J. Aaron, "The Costs of Health Care Administration in the United States and Canada—Questionable Answers to a Questionable Question," pp. 801–3. Both of these studies find, for 1999, that administrative costs constitute 31 percent of total health care spending in the United States.

This difference in administrative costs that Barr refers to (about 23%) totals approximately $300 billion per year in additional spending on health care administration in the United States, that is, about $3,000 per year for a three-person family. There are also many other factors that raise the costs of the American health care system without improving outcomes. Among them are the tendency of the uninsured to use costly emergency care and to wait for access to health care until their conditions have worsened and have

become more difficult and costly to treat; the tendency that we have discussed of fee for service coupled with indemnity insurance with no gatekeeper to result in oversupply and overconsumption; and the incidence of malpractice suits and attendant legal and insurance costs. The last of these, though, should not be overemphasized. Malpractice premiums are only a comparatively tiny part of the problem. Total malpractice premiums along with court judgments and settlements for medical malpractice in the health care industry, taken together, come to less than $15 billion annually. See Richard A. Oppel Jr., "With a New Push, Bush Enters Fray over Malpractice," *New York Times,* January 17, 2003, p. A20, on court judgments and settlements. Total spending on health care in the nation surpasses $1 trillion per year.

26. Aggregate health outcomes (such as infant mortality rates, life expectancy, and rates of death) are quite similar in the United States and Great Britain. In some cases they are slightly better in Great Britain; in other cases they are slightly better in the United States.

27. Reported in "Charting an HMO Cure," *Los Angeles Times,* July 26, 1999, p. B4.

28. A similar combination is available in Great Britain. About 10 percent of Britons have private health insurance on top of their universal coverage.

29. This conclusion holds even for individuals who currently do not want health insurance but would be covered mandatorily in a universal system. Most such individuals eventually do want coverage and may well be unable to obtain it in the present system when they need and want it because of either preconditions or other reasons connected to adverse selection. In the present system, moreover, they are already paying for health care coverage for others, although not themselves, to the degree that others' employee benefits are passed on to consumers through higher prices.

30. Marcia Angell, "The Forgotten Domestic Crisis," *New York Times,* October 13, 2002, p. 13.

31. An investor in bonds, for example, might become worse off when the Federal Reserve fights inflation it considers impending by using countercyclical policy that raises interest rates substantially, but that is a risk investors in bonds can reasonably be presumed to have understood and accepted in making their purchase.

32. Even health care as a whole fits this description. However, the particular areas of it that government has concentrated on (health care for the elderly and low-income Americans) are directed more to other issues, such as economic opportunity discussed in Chapters 3 and 4, although the areas also involve larger market failures whose solution can fit the Lockean proviso. See also note 22 above.

33. For public expenditures on national security, basic research outside defense, and natural monopolies in 2000, together totaling $750 billion, see notes 7 and 9 of this chapter. The cost does not include addressing market failures in health care, about $540 billion annually in 2000, which I subsume under the area of economic opportunity.

SEVEN: The Size and Waste of Government

1. Total spending for federal, state, and local governments came to $3,240 trillion in 2000. See U.S. Bureau of the Census, *Statistical Abstract of the United States, 2003* (Washington, D.C.: GPO, 2003), p. 322, table 475 (total federal expenditures); p. 285, table 442 (total state and local expenditures); and p. 285, table 442 (state and local revenues from federal sources, which are subtracted from the total.) Earlier chapters detailed spending

for 2000 for programs and activities related to economic opportunity ($1.83 trillion, found in Chapter 3, see esp. table 3.1, including health-related expenses alluded to in table 3.1 and described in Chapter 6, at note 21); wrongful harm ($185 billion, found in Chapter 5, at the beginning of the section entitled "Is Regulation an Answer?"); and market failures ($750 billion, found in Chapter 6, esp. at notes 7 and 9). In addition, spending by federal, state, and local governments for interest on debt came to $293 billion in 2000 (U.S. Bureau of the Census, *Statistical Abstract of the United States, 2003,* p. 324, table 479, as well as p. 286, table 443). Taken together, those expenditures amount to $3.06 trillion, or 94 percent of total governmental expenditures in 2000.

2. See previous note.

3. Some examples of expenditures outside questions connected to liberty include farm subsidies not tied to issues of market failures; public funding for the arts and humanities disassociated from the obligation of public education; public ownership in areas of working markets in which there is less costly private competition (as, for example, may happen in waste management); foreign aid for humanitarian as opposed to strategic purposes; and public payments such as flood or earthquake assistance to individuals for whom affordable private insurance was or could be readily available.

4. Cheryl M. Holsey and Thomas E. Borcherding, "Why Does Government's Share of National Income Grow? An Assessment of the Recent Literature on the United States," in Dennis C. Mueller, ed., *Perspectives on Public Choice* (New York: Cambridge University Press, 1997), pp. 562–89.

5. Quoted in David Firestone, "Conservatives Now See Deficits as a Tool to Fight Spending," *New York Times,* February 11, 2003, p. A22.

6. Had governmental expenditures remained at 25.7 percent of the GNP in 1990, which was where they were in 1980, they would have totaled $1.490 billion in 1990, about $120 billion less than the $1,610 billion to which they actually amounted. Of the $120 billion added growth the increased interest payment on the debt ($130 billion) more than accounts for it.

7. For comprehensive evidence on the real growth and decline of federal agencies and programs from 1947 to 1995, see Bryan Jones, Frank Baumgartner, and James L. True, "Policy Punctuations: U.S. Budget Authority, 1947–1995," *Journal of Politics* 60 (February 1998), pp. 1–33. In virtually every year from 1947 to 1995, quite a few program areas lost ground in inflation-adjusted dollars (see fig. 1, p. 8). On average, 15 percent of all program areas experienced a reduction of at least 15 percent or more from the previous year (see table 2, p. 16).

8. One study of the costs of regulation at the federal level, from 1977 to 1996, found that such costs rose from slightly above $600 billion in 1996 dollars to about $700 billion over those nineteen years. The latter amount comes to 9 percent of the GNP in 1996, compared with about 12 percent of the GNP in 1977. After steadily declining from 1977 to 1988, regulatory costs began rising sharply from 1988 to 1996. See Pietro S. Nivola, "The New Pork Barrel," *Brookings Review* 16 (Winter 1998), pp. 6–9. The figures for regulatory costs found in several other longitudinal examinations from 1979 to 1990 and from 1974 to 1979 also show little rise, or actually a decline, in those costs once they are placed against the GNP, despite the researchers' claims to the contrary. See the figures for 1979 and 1990 in Robert W. Hahn and Thomas D. Hopkins, "Regulation/Deregulation: Looking Backward, Looking Forward," *American Enterprise* 3 (July/August 1992), p. 73, and the critique of the work of Murray Weidenbaum for 1974–79 in John E. Schwarz, *America's*

Hidden Success: A Reassessment of Twenty Years of Public Policy (New York: W. W. Norton, 1983), pp. 98–107.

9. The annual figures I cite are based upon the average wage and salary per hour for 2,000 hours of work in a year (that is, 40 hours a week for 52 weeks except for ten public holidays), for each respective year. The average wage and salary per hour are estimated from Lawrence Mishel et al., *The State of Working America, 1998–99* (Ithaca, N.Y.: Cornell University Press, 1999), p. 124, table 3.2, for 1960 (from 1959), and Lawrence Mishel et al., *The State of Working America, 2002–03* (Ithaca, N.Y.: Cornell University Press, 2003, advance proofs copy), p. 118, table 2.2, for 1980 (from 1979) and 2000. I have put the figures in *2001 dollars*.

10. Half of the improvement in worker productivity should return to workers in the form of increased hourly compensation (see Chapter 3, note 29). During the period of the lowest average after-tax improvement in wages, from 1980 to 2000, *average* after-tax hourly real pay grew by 16 percent, nearly half of the 36 percent rise in worker productivity over those same years. From 1960 to 2000, productivity advanced by about 124 percent and after-tax average hourly real pay by 60 percent.

11. See the discussion in Chapter 6, the section entitled "Liberty." Recall, as well, that much of the spending devoted to addressing market failures of this genre (having to do, for example, with basic research and countercyclical policy) simultaneously also aims at attaining other purposes necessary to liberty, such as providing national security or attacking problems of minimally adequate economic opportunity.

12. Quoted in Martha Mendoza, "Police Getting More Leeway to Watch Political Groups," *Arizona Daily Star,* April 4, 2003, p. A17.

13. Andrew Ross Sorkin, "Tyco Details Lavish Lives of Executives," *New York Times,* September 18, 2002, p. C1.

14. A wide variety of examples are found in George W. Downs and Patrick D. Larkey, *The Search for Government Efficiency* (New York: Random House, 1986), pp. 30–40; H. Brinton Milward and Keith G. Provan, "Governing the Hollow State," *Journal of Public Administration and Theory* 2 (April 2000), pp. 359–79; Joel F. Handler, *Down From Bureaucracy* (Princeton, N.J.: Princeton University Press, 1996); and Eyal Press and Jennifer Washburn, "Neglect for Sale," *American Prospect* 11 (May 2000), pp. 22–29. See also the comparison of public education with for-profit education in Chapter 4.

15. Derek Bok, *The Trouble with Government* (Cambridge: Harvard University Press, 2001), pp. 230–31; Richard W. Stevenson, "Government May Make Private up to 800,000 Jobs," *New York Times,* November 15, 2002, pp. 1, 21. For additional evidence suggesting a similar conclusion, see also note 14.

16. Schwarz, *America's Hidden Success,* p. 75.

17. Figures on the New York State attorney general's Web site "show that, on average, [only] 30 percent of the money raised for charity in New York actually goes to the charities." See Linda Greenhouse, "Supreme Court Issues Ruling on Fund Raising for Charity," *New York Times,* May 6, 2003, p. A23.

18. Four percent of annual federal revenues comes to about $80 billion. "Pork" is not the only kind of inefficiency by any means, but it is sometimes considered the epitome of waste. One estimate of the cost of "pork" in federal spending, by the Citizens Against Government Waste, measured it at $6 billion in 1996–97 and at about $18 billion annually several years later. See Citizens Against Government Waste, *Congressional Pig Book* (Washington, D.C.: Citizens Against Government Waste, 2001). Of course, even in this

area, what is "pork" to one observer may be spending with a legitimate end in mind in the eyes of another. See, for example, John A. Hird, "The Political Economy of Pork: Project Selection at the U.S. Army Corps of Engineers," *American Political Science Review* 85 (June 1991), pp. 429–56. Hird demonstrates that many projects often described as pork—said to curry political favor—simultaneously have important social aims and effects having to do with equity and economic efficiency. See also the next note.

19. Quite a few examinations of the general domestic activities of the federal government, once subjected to scrutiny, have found waste to average below 5 percent of federal domestic spending. For discussion of a number of examples, undertaken by critics of government during the most recent decade of sizeable growth in governmental spending, see John E. Schwarz, *America's Hidden Success: A Reassessment of Twenty Years of Public Policy from Kennedy to Reagan,* rev. ed. (New York: W. W. Norton, 1988), pp. 61–68 and p. 244, note 54. See also note 18 of this chapter.

20. On "welfare queens," see Daniel Schorr, "Washington Notebook," *New Leader,* March 1995, p. 3; on the coffee pot and the hammer, see James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), pp. 319–20.

EIGHT: Societal Decisions and Individual Liberty

1. Quoted in Eric Foner, *The Story of American Freedom* (New York: W. W. Norton, 1998), p. 16.

2. The principle that we should each have equal standing because the collective decisions shape each of our lives and choices might lead to the suggestions that, according to this same principle, those with more at stake (say, wealthier individuals) should have greater influence. We are dealing here, of course, not with any particular collective decision but with the overall impact of those decisions as a whole.

Equality follows from two considerations. First, lives are not larger or smaller, but equal. Equality is the presumption. No conclusive reason or evidence exists to believe that governmental decisions, across all areas and taken as a whole, have lesser impact proportionately on the lives of low- or moderate-income Americans than on the lives of those who are well off. Second, indeterminate numbers of low- and moderate-income individuals are in their current position because of the effects of present, let alone past, deprivations of freedom. To argue that those individuals who have been held back by the scarcities of opportunity described in Chapters 3 and 4 should thereby also have lesser influence in the making of collective decisions is an invalid conclusion that only enlarges the problem.

3. Most of these rights are found in the federal and state constitutions, or they are derivatives of rights found therein, for instance, the right to the availability of multiple independent sources of information. The rights referred to are not merely political in nature, that is, meant to apply only to political action. They are also social. They arise from the more general liberty of individuals, described in Chapter 1, to use their own capabilities (for example, conscience, ideas, voice, and energies) and resources as they determine, not simply in the political realm but anywhere. The liberties, though, may be accorded broader range as they apply to the political process. For example, speech that utters damaging statements against a governing official that turn out to be false may be treated as protected speech (protected from punishment), whereas the same speech uttered against a private individual might be proscribed as defamation or libel within the meaning of wrongful harm.

4. Issues or actions about which leaders deliberately deceive the public, like the Tonkin Gulf incident or possibly the extensiveness of weapons of mass destruction in Iraq and connections between Saddam Hussein and Al Qaeda leading up to the Iraq War of 2003, to the degree they were deliberate deceptions, depart from the morality of freedom unless fairly deemed necessary to protect the nation from immediate threat or what was fairly understood to be an immediate threat. Purposeful deception interferes with the ability of individual citizens and the public to make choices based upon truthful information. It constitutes an irreparable violation of individuals' freedom whenever there is no reasonable and timely way for individuals and the public to attain sound alternative information.

5. A right to education, at some level, is contained in the constitutions of each of the fifty states. The right of educational opportunity appropriate to freedom must allow individuals to be political equals, as suggested here, and to attain a dignified living standard (see Chapter 3, note 5, and Chapter 4, note 2).

6. Thus, whether for the public or the legislature, a rule of unanimity allowing one individual to override all other individuals on whether a measure will be adopted gives more power to an individual who supports the status quo than to all others. The same is true for rules requiring a super majority for passage, such as a two-thirds or three-fifths vote. By contrast, majority rule based upon one person, one vote, accords equal power to every individual who favors and every individual who opposes.

7. A conclusion as to whether the Senate meets this condition is difficult to reach because only one-third of the Senate is elected at any given time. Giving all states two votes regardless of population size, however, violates the requirement of liberty for equal political standing, that the vote of each citizen be equal to the vote of every other citizen. In the case of the Senate, the vote of every citizen of Wyoming is given about seventy times the weight of the vote of each citizen of California.

8. Gerrymandering runs counter to this condition. It is a practice intended to produce lopsided majorities in districts whereas this would not be the result using natural political boundaries or formulas that an independent, neutral commission might reasonably employ. Gerrymandering is an outright abuse, diminishing the liberty of every citizen it touches. Unhappily, it is an old yet still growing practice.

9. The presidential veto does not oppose this precept. In effect, the presidency stands as a third *elective* institution whose negative vote is not decisive—unlike a negative vote by either the House or the Senate—but instead can be overridden if the House and Senate each attain a two-thirds majority.

10. In this regard, the discharge petition in the House and the discharge motion in the Senate, as well as the Senate's nongermane amendment, are examples of reasonably practical devices for majorities to get bills out of committee and onto the floor. To the degree that those devices are not effective against procedures such as a filibuster, or any procedure allowing a minority to block action indefinitely, such blocking procedures run counter to liberty unless they are used by a minority in the body for the specific purpose of thwarting a majority from overrunning their freedom, or the freedom of others, as legitimately defined and understood.

11. See Alex Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).

12. For the importance of wealth and being able to assure funding for one's own election campaign, see Alan Gerber, "Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables," *American Political Science Review* 92 (June 1998), pp. 401–11.

13. Examining the financing of politics through surveys of both the public and political recruiters, Henry E. Brady, Kay Lehman Schlozman, and Sydney Verba ("Prospecting for Participants: Rational Expectations and the Recruitment of Political Activists," *American Political Science Review* 93 [March 1999], p. 163, table 4) find that the highest income group (about $100,000 in annual income in 2000 dollars) donated 64 percent of the total dollar value of financial contributions directly recruited by candidates and 54 percent of all contributions received.

14. Joe Klein, "Public Life," *New Yorker,* November 11, 2002, p. 67.

15. Senator Simpson quoted in Richard A. Oppel and Neil A. Lewis, "Campaign Law Set for a Big Test in a Courtroom," *New York Times,* December 3, 2002, p. A29. For excerpts of the Supreme Court opinion relevant to Senator Simpson's observation, see "Excerpts from the Supreme Court Ruling on McCain-Feingold Campaign Finance: From the decision by Justices Stevens and O'Connor," *New York Times,* December 11, 2003, p. A24. The decision of the Court read: "Plaintiffs argue that without concrete evidence of an instance in which a federal officer has actually switched a vote . . . Congress has not shown that there exists real or apparent corruption. But the record is to the contrary. The evidence connects soft money to manipulations of the legislative calendar, leading to Congress's failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation."

16. For the role and importance of money in activating citizens at the grass roots, producing foundational studies, and engaging in effective public relations campaigns, see Darrell M. West and Burdett A Loomis, *The Sound of Money: How Political Interests Get What They Want* (New York: W. W. Norton, 1998).

17. On the role of well-financed interests in the initiative process, see Richard Ellis, *Democratic Divisions: The Initiative Process in America* (Lawrence: University of Kansas Press, 2002).

18. Quoted in Bill Moyers, "Commencement Remarks," Office of Public Affairs, University of Texas, 2001.

19. From the Center for Responsive Politics based upon federal election data released on December 2, 2002; see http://www.opensecrets.org/overview/topindivs.asp?cycle=2002.

20. For the influence of spending on the waging of election campaigns and on the impact of campaigns on voters, for challengers, see Gary Jacobson, "The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments," *American Journal of Political Science* 34 (May 1990), pp. 334–62. For both challengers and incumbents, see Gerber, "Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Values."

21. Calculated from the survey results of the University of Michigan Survey Research Center reported in Samuel Kernell and Gary C. Jacobson, *The Logic of American Politics* (Washington, D.C.: CQ Press, 2000), p. 337, fig. 10–4.

22. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 225.

23. Calculated from data compiled by the Tax Foundation. See http://taxfoundation.org/pr-fedtaxspendingratio.html. Figures are for fiscal year 2000.

24. Frances E. Lee and Bruce J. Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation* (Chicago: University of Chicago Press, 1999), pp. 158–85, and Stephen Ansolabehere et al., "Equal Votes, Equal Money: Court-Ordered Redistrict-

ing and Public Expenditures in the American States," *American Political Science Review* 96 (December 2002), pp. 767–78.

25. Among the many problems, see those recounted in Jonathan N. Wand et al., "The Butterfly Ballot Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida," *American Political Science Review* 95 (December 2001), pp. 793–810.

26. Arizona senator John Kyl's comments defending why President Bush's conservative nominees to the federal courts deserved confirmation exemplify the problem; they illustrate how supporters of the president overlook his minority status. At the time, Senator Charles Schumer of New York led the opposition. Senator Kyl argued: "[The Democrats] do not want to confirm Republican nominees whom they see as too conservative. The test they are applying is basically a Charles Schumer test. I don't think that Chuck, being from New York, is the best person to define what mainstream America is. I'm not sure I am, either. I think the President, *since he is elected nationally,* is the best representative." Italics mine. Quoted in Jeffrey Toobin, "Advice and Dissent," *New Yorker,* May 26, 2003, p. 45.

27. A number of rules are not made through an elected representative process. Often called regulations, they are made by administrative bodies of one kind or another. To conform to the morality of liberty, regulations or other similar rules can gain the force of law only if made through the sanction of the elected representative process. Such sanction is embodied in an enabling law, approved by an elected representative body. This law establishes the agency and spells out its scope of authority as well as the procedures the agency must follow. Thereafter, the legislature can alter or void the enabling law and regulations made under it at will. Even the common law, made through the courts, is subject to alteration through the elective representative process.

Some observers call for stronger laws than the existing enabling laws, proposing instead laws that carefully direct the agency and do so in great detail. They believe that the agency otherwise is in effect making law through its regulatory power but is not itself directly accountable to the public through elections (see Theodore Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* [New York: W. W. Norton, 1969], and Anne Schneider and Helen Ingram, *Policy Design for Democracy* [Lawrence: University of Kansas Press, 1997]). Yet with regulations arising from delegated power, those representatives who supported (or continue to support) the delegation of power and the regulations made under it *are* directly accountable.

28. Considerable research has reported that even when their own self-interest is at some risk, individual representatives may still act out of their view of the public interest and fundamental justice as they understand it. Some interesting examples of research showing the effects of factors other than self-interest on legislators' behavior are Robert A. Bernstein and William J. Anthony, "The ABM Issue in the Senate, 1968–1970: The Importance of Ideology," *American Political Science Review* 68 (September 1974), pp. 1198–1206; Peter Benson and Dorothy L. Williams, *Religion on Capitol Hill* (New York: Harper and Row, 1982), pp. 107–68; Steven Kelman, *Making Public Policy* (New York: Basic Books, 1988), pp. 58–66; and Richard Hall, *Participation in Congress* (New Haven: Yale University Press, 1996), pp. 111–61 and 175–210.

29. Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), pp. 187–92.

30. Deborah Sontag, "The Power of the Fourth," *New York Times Magazine,* March 9, 2003, p. 80.

31. Quoted in Elisabeth Bumiller, "Bush Vows to Seek Conservative Judges," *New York Times,* March 29, 2002, p. A18.

32. Ibid.

33. United States Appeals Court judge J. Michael Luttig was unusually forthcoming when he said of judges: "I believe that there's a natural temptation to line up as political partisans that is reinforced by the political process." Quoted in Sontag, "Power of the Fourth," p. 45.

34. See Chapter 9, note 74, where I suggest some possibilities.

35. In *Bush v. Gore,* 531 U.S. 98 (2000), for example, the Supreme Court acknowledged that the procedure of both the election and its aftermath involved sufficient constitutional problems of equal protection as to fully warrant recounts but found that the recount procedures were themselves violating equal protection. In determining what to do about that, then, the Court essentially decided to give priority to timetables contained in federal and state statutes in preference to honoring the equal protection clause of the Constitution and the principle of equal political standing. Rather than require that the statutory timetable be interpreted or extended in such manner as to permit a satisfactory recount to proceed in the name of equal protection called for in the Constitution, the Court instead deferred to the statute. The Court said: "That statute . . . requires that any controversy or contest that is designed to lead to a conclusive solution of electors be completed by December 12. That date is upon us. . . . Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed." In so doing, the Court allowed all the constitutional violations of equal protection involved in the election and the original machine recount to stand in favor of meeting a statutory timetable. Earlier in the same decision, amazingly, the Court had said: "The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees."

36. A point that individuals supporting the imposition of a religious view often make is that society, through the law, must provide a moral foundation to guide action. As I have said, of course, liberty is a morality, as the considerable overlap between the Ten Commandments and the reasoning of liberty attests. But that aside, it is interesting that at key points those who advocate using the law to enforce religious principles themselves sometimes promote freedom (that is, free will) rather than coercion of the law as the proper way to deal with fundamental moral matters that constitute basic sins. The egregiousness of materialism as a sin is a topic of many ministers' sermons. It involves a fundamental sin in their eyes, including in the thinking of many leaders on the religious right. Whenever it comes to this sin of materialism, however, those ministers and leaders usually call for redemption through self-correction and coming to Christ, that is, through free will. They do not seek the imposition of laws and regulations that attempt to force individuals to abandon a focus on materialism (or to force them to refrain from some other sins, such as disobeying the Sabbath). By contrast, they object to that same approach of individual free will when it comes, for example, to areas concerning sex that they consider to be sins, such as homosexuality (even here, though, many from the Right today no longer call for state prohibitions and penalties when it concerns some other sexual sins, such as adultery). That does not mean their support for regulation, whether regarding issues of sex or other areas connected to religious or cultural morality, is automatically inappropriate or wrong. But such regulation can become appropriate under

freedom *only* through clear demonstration that a principle or set of principles of freedom is at stake.

NINE: Taking Freedom Seriously

1. Arguably the largest of the breaches not taken up in this chapter concerns the degree to which courts fail to apply a principle of least restrictiveness to economic regulation and national security issues. In the latter area, courts have tended in the past to show the executive branch great deference, as Chief Justice William H. Rehnquist observes in his *All Laws but One: Civil Liberties in Wartime* (New York: Knopf, 1998). In the former, courts focus more on whether regulations address a wrongful harm along with whether the means used are relevant to controlling that harm. They distance themselves from the question of whether those means are the least restrictive able to attain the same control of the harm or whether, instead, an imperative case can be made to the effect that this is not so (see Chapter 5, the text surrounding note 29 and the note itself, for further discussion).

2. See the argument in Chapter 2 and its application in Chapters 3 and 4.

3. See Chapter 2. With respect to decent opportunity and a minimally dignified living, definitions and measures are found in Chapters 2 and 3.

4. See Chapter 2, introductory pages and section entitled "The Restatement and the Thinking of the Founders."

5. As of April 2003, there were 8.8 million workers unemployed and another 4.8 million in part-time jobs for the reason that they could not find adequate full-time work. Both numbers had risen since 1999. If the number of year-round full-time workers in jobs paying below a minimally adequate wage remained the same as in 1999, at 14.1 million, then a total of 27.7 million workers were economically distressed. That total does not include another estimated 1 to 2 million workers, called discouraged workers, who had dropped out of the job market altogether.

6. In 1999, about 23 million workers were distressed, or 16.5 percent of the labor force. That figure stood at about 19 percent of workers in 1989 and 15.1 percent in 1979. Distressed workers are those who are unemployed, hold part-time jobs because they cannot find satisfactory full-time work, or are employed in year-round full-time jobs paying less than an adequate wage. For sources, see Chapter 3, notes 24 and 26.

7. For evidence, see, in this chapter, the text at notes 25–28.

8. See Chapter 4, notes 21–22, for sources and evidence.

9. Three years following the reform, in 1999, there were 23 million workers who were distressed and unable to reach a minimally adequate wage, as compared with about 3 million who had left the welfare rolls after the reform. Prior to the reform, approximately 5 million adults were on welfare. For the number of distressed workers in 1999, see Chapter 3, note 26.

10. See Chapter 3, section entitled "The Upward Economic Mobility of Americans." Over the ten years of the full economic cycle prior to welfare reform, ending in 1989, 62 percent who had children and who started in year-round full-time jobs paying low wages remained below a minimally adequate wage at the end even if they had worked year-round full-time continuously for the prior decade. With respect to workers with some postsecondary education beyond having a high school degree, 62 percent of them, too, were unable to move out of low-paying jobs and into jobs paying a minimally adequate wage over the ten years.

11. See Chapter 4, note 6.

12. Because of growing earnings inequality, the *average* compensation of workers rose by 35 percent from 1973 to 2001, whereas the *median* compensation (for the worker exactly in the middle) rose by only about 8 percent. Meanwhile, the overall productivity of workers increased by 54 percent during those years. See Lawrence Mishel et al., *The State of Working America, 2002–03* (Ithaca, N.Y.: Cornell University Press, 2003, advance-proofs copy), p. 155, fig. 2L. For more on the translation of productivity into wages, including the issue of return to skills, see Chapter 3, the text at notes 28–33 and the notes themselves.

13. From 1979 to 1997 alone, the top *1 percent* of households on the income ladder (about 1 million households in total in 1997) received an annual $600 billion rise in real incomes (about $600,000 annually per household), nearly tripling their real annual income by 1997 as compared with 1979. No other household grouping received even half the percentage increase that the top 1 percent of households on the income ladder did; the median family received less than one-tenth of that percentage increase over the period (based on household income data in Mishel et al., *State of Working America, 2002–03,* p. 69, table 1.17). For a discussion and refutation of return-to-skill explanations of the growing wage and income inequality of the period, see Chapter 3, the text surrounding notes 32–33 and the notes themselves.

14. See Chapter 3, the text surrounding notes 28–31 and the notes themselves, for details covering the entire 1973–2003 period.

15. The diminished proportion of all federal tax revenues received from corporations alone has reduced those revenues today by more than $100 billion annually, as compared with 1970. Corporations pay taxes on their profits, and they also pay approximately half of all social insurance taxes. Those taxes combined (taxes on corporate profits and half of social insurance taxes) came to 32 percent of federal revenue in 1970 and 26 percent in 2000. This difference of 6 percent amounts to about $120 billion of total federal revenues. The difference occurred entirely because of reductions in corporate profits taxes over the years. Households in the bottom 95 percent of the income scale pay 60 percent of federal income taxes. If an increased corporate contribution of $120 billion replaced income taxes, households in the bottom 95 percent would receive a reduction averaging about $700 per household. Among those households actually paying net taxes, the average reduction would be approximately $1,000.

16. The aggregate total during the three decades of the growing gap between productivity and compensation comes to about $170,000 in today's dollars for a family with one and one-half full-time workers receiving the median compensation. In 2001, the net worth of the median American family stood at $86,100 (*U.S. Bureau of the Census, Statistical Abstract of the United States, 2003* (Washington, D.C.: GPO, 2003), p. 469, table 709).

17. Mishel et al. [*State of Working America, 2002–03,* p. 97, table 1.27] report that median-income married-couple families with children increased their time in employment by 660 hours from 1979 to 2000, or by 20.2 percent.

18. Mishel et al. (*State of Working America, 2002–03,* p. 101, table 1.29) show that the real income of the median married-couple family with children rose by about 25 percent during the twenty-one years from 1979 to 2000; the hours worked rose by about 20 percent (see previous note). So real income growth barely exceeded the lengthened work hours, let alone the expenses they involved. For much of the period, real income actually grew less than the rise in hours employed. See Chapter 3, the subsection titled "The Improved Standard of Living of American Families from the 1970s to the 1990s."

19. Lawence Mishel et al., *The State of Working America, 1998–99* (Ithaca, N.Y.: Cornell University Press, 1999), p. 171, table 3.26.

20. Ibid., p. 161, table 3.22.

21. Alan B. Krueger, "Economic Scene," *New York Times,* December 12, 2002, p. C2, reporting research carried out by Marianne Bertrand of the University of Chicago and Sendhil Mullainathan of the Massachusetts Institute of Technology. Based upon submitting 3,761 job applications with randomly selected résumés to 1,300 help-wanted ads from newspapers in Boston and Chicago, the researchers found that the résumés with white common first names were selected for interviews at a rate 50 percent greater on average than were similar résumés containing black common first names.

22. It is less certain how consistently the gender gap has closed when education is taken into account. For entry-level workers with a high school degree, for example, the male/female wage gap has declined from 37 percent to 19 percent between 1973 and 2001; by contrast, for entry-level workers with a college degree, the wage gap between males and females widened somewhat between 1973 and 2001, from 19 percent to 21 percent. Calculated from Mishel et al., *State of Working America, 2002–03,* p. 162, table 2.21. However, see Francine D. Blau, "Trends in the Well-Being of American Women, 1970–1995," *Journal of Economic Literature* 36 (March 1998), pp. 126–31, who finds narrowed wage gaps for women at all levels of education but gaps, nevertheless, that continue to be large.

23. Minorities continue to experience considerably higher levels of unemployment than whites, as has been so for many years. Unemployment rates for blacks, for example, have remained at about double the rate for whites—for half a century—8.7 percent compared with 4.2 percent in 2001; 10.4 percent compared with 5.1 percent in 1972; 10.2 percent for "Black and other" compared with 5.0 percent for whites in 1960; and 9.0 percent for "Black and other" compared with 4.9 percent for whites in 1950. Racial gaps in the official poverty rate did narrow modestly from three to one prior to 1970 to about two to one in 2000, still leaving a fairly sizable difference, though.

Some people refer to the advancing educational attainment of minorities relative to whites as a principal step forward during the past three decades. The evidence indicates a more mixed picture. For example, the black/white gap in median years of education, measured by twenty-five- to twenty-nine-year-olds, closed mostly between 1950 and 1970. It has changed only modestly since 1970. During the period, blacks did make substantial occupational gains, yet a good measure of these gains resulted from affirmative action policies that had been enacted and and whose implementation had already begun by the early 1970s. See Philip A. Klinkner with Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago: University of Chicago Press, 1999), pp. 321–22.

24. On the implications, see Christopher Jencks and Meredith Phillips, "America's Next Achievement Test: Closing the Black-White Test Score Gap," *American Prospect* 9 (September–October 1998), pp. 44–53.

25. For the construction of a minimally adequate wage and its relation to the standard of living common to the day, see Chapter 3, the sections entitled "The Measurement of a Socially Decent Minimum" and "The Adequacy of Opportunity in the General Economy."

26. Estimating for change in the living standard, I place the intended poverty line, adjusted for inflation, at approximately $2,200 for a family of four in 1950 (90 percent of the federal poverty line adjusted for inflation back to 1950). One and one-half full-time

workers at the minimum wage ($0.75 per hour) would have earned $2,250 in 1950. The minimum wage, as a result, was slightly higher than the minimally adequate wage in 1950. For a discussion of the intended poverty line and a minimally adequate wage, see Chapter 3, the sections entitled "The Measurement of a Socially Decent Minimum" and "The Adequacy of Opportunity in the General Economy." See also the second paragraph of note 27 of this chapter.

27. The intended poverty line in 1965 was approximately $4,030 for a family of four (125 percent of the official poverty line). One and one-half full-time workers at the minimum wage ($1.25 per hour) would have earned $3,750 in 1965, or 93 percent of the intended poverty line. For a discussion of the intended poverty line, see Chapter 3, the sections entitled "The Measurement of a Socially Decent Minimum" and "The Adequacy of Opportunity in the General Economy."

Adequate opportunity for a family with two adults and children is based upon one and one-half workers as long as fewer than one-third of married women with children below age six and fewer than one-half of all married women with children had entered into the labor force at all. That condition prevailed until the early 1970s (see U.S. Bureau of the Census, *Statistical Abstract of the United States, 1992* [Washington, D.C.: GPO, 1992], p. 388, table 620). Thereafter, adequate opportunity assumes one and two-thirds full-time workers for a family with two adults, the highest number of workers for which employment for low-wage workers with children is economically productive. Costs related to after-school child-care arrangements, even if only several times a week, generally make low-wage full-time employment for the second earner uneconomic unless the work is during evening and nighttime hours. Full-time work is considered to be 2,000 hours over a year (40 hours per week for 52 weeks, excepting ten public holidays).

On top of the decline of the minimum wage relative to the intended poverty line, from 1950 to 1965 employment opportunities also grew more slowly than did the number of households. During those years, a total of 13.6 million net additional nonelderly households formed, compared with 12.2 million net additional jobs, and some of those additional jobs were taken by increasing numbers of second earners entering the labor market.

28. The intended poverty line for 2002 was approximately $31,500 for a family of four, which came to 170 percent of the official poverty line. One and two-thirds full-time workers at the minimum wage ($5.15 per hour) would have earned about $17,300 in 2002, or 55 percent of the intended poverty line.

29. In 2002, the Earned Income Tax Credit combined with food stamps would have provided approximately $5,100 for a family with two children and pay of $17,300 (the total earnings of a family based on one and two-thirds full-time workers paid the minimum wage). The assistance raises the family's income to $22,400. That figure comes to $9,100 below the intended poverty line of $31,500 for a family of four in 2002, and to just over 70 percent of the needed income. Note 18 of Chapter 3 explains why one and two-thirds full-time workers, rather than two full-time workers, is taken as the standard for a family of two adults with children. Recall that families containing no children receive little aid from the Earned Income Tax Credit.

30. President Bush's own proposed budget for 2004 provided only two-thirds the level of funding ($12 billion out of $18 billion) that was deemed required and authorized in the original act he signed. Even this diminished level of funding itself was financed by cutting other educational assistance aimed, for example, at reducing school dropout rates and supporting after-school programs for students. There is dispute about whether

enough money has been forthcoming to administer the tests themselves. See Sam Dillon, "States Lower Standards for Education Law," *New York Times,* May 22, 2003, p. A25.

31. Michael Winerip, "A School Left Behind by New Federal Standards," *New York Times,* February 19, 2003, p. A24. See also Dillon, "States Lower Standards for Education Law."

32. See Klinkner and Smith, *Unsteady March,* pp. 318–21, as well as notes 21, 22, 23, and 24 of this chapter. One bright spot in the otherwise mixed picture regards the advance in addressing discrimination against individuals with disabilities that came with legislation adopted in 1991.

33. See, for example, Saul K. Padover, ed., *The Complete Madison: His Basic Writings* (New York: Harper and Brothers, 1973), pp. 322–24. Madison often used the word *competency* to describe the ability to provide a decent living. For the meaning of the word *competency* in colonial America, see Daniel Vickers, "Competency and Competition: Economic Culture in Early America," *William and Mary Quarterly* 47 (January 1990), pp. 3–29.

34. Crime rates did indeed begin to decline somewhat in the first half of the 1980s only to reverse and climb steeply in the second half of the 1980s and the early 1990s.

35. For the connection between inadequate economic opportunity and crime during the 1980s, see Richard B. Freeman, "Why Do So Many Young American Men Commit Crimes and What Might We Do about it?," *Journal of Economic Perspectives* 10 (Winter 1996), pp. 25–42. Between 1979 and 1989, the proportion of distressed workers in the American economy grew by one-quarter, climbing from 16.1 million workers (15.1 percent of the labor force) in 1979 to 24.3 million workers (19.6 percent of the labor force) in 1989. Recall that distressed workers are either unemployed and seeking work, hold part-time jobs because they cannot find satisfactory full-time work, or are employed in full-time jobs paying below an adequate wage.

36. Significant increases in the Earned Income Tax Credit began taking place in 1994, fresh increases in the minimum wage occurred in 1996 and 1997, and the real wage for workers in the bottom quarter of male wage earners began increasing significantly in 1994, and then continued perennially, for the first time in more than two decades.

37. The proportions of distressed workers at the heights of the recoveries in 1999 and 1979 were approximately 16.5 percent and 15.1 percent of the labor force, respectively.

38. The rate of violent and property crime per 100,000 population was 4,124 in 2000; 5,898 in 1991; 5,802 in 1990; 5,950 in 1980; 3,985 in 1970; and 1,887 in 1960. The figure for 1950, 1,771, is not strictly comparable to the other figures. For the rate from 1980 to 2000, see U.S. Bureau of the Census, *Statistical Abstract of the United States, 2002,* p. 183, table 283; and from 1950 to 1980, see Charles Murray, *Losing Ground: American Social Policy, 1950–1980* (New York: Basic Books, 1984), p. 256, table 18, the addition of violent and property crimes.

39. *The Merriam Webster's Collegiate Dictionary* (Springfield, Mass.: Merriam-Webster, 1994), 10th ed., s.v. "slave."

40. *Gideon v. Wainwright,* 372 U.S. 353 (1963).

41. *Douglas v. California,* 372 U.S. 353 (1963).

42. *Kirby v. Illinois,* 406 U.S. 682 (1972).

43. *Ross v. Moffit,* 417 U.S. 600 (1974).

44. Adam Liptak, "County Says It's Too Poor to Defend the Poor," *New York Times,* April 15, 2003, p. A14.

45. David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: New Press, 1999), pp. 78–79; Alan Berlow, "The Wrong Man," *Atlantic Monthly* (November 1999), pp. 83–84.

46. Steve Mills et al., "Flawed Trials Lead to Death Chamber; Bush Confident in System Rife with Problems," *Chicago Tribune,* June 11, 2000, sec. 1, p. 1.

47. Cole, *No Equal Justice,* p. 86 and p. 99, note 77.

48. Ibid., p. 85.

49. The figure I use, 450 hours, comes from the following: the average attorney time per representation in federal capital cases in which authorization to seek a capital sentence was denied was 429 hours; the average for cases in which such authorization was approved of was 1,464 hours. See Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation,* May 1998, p. C-7.

50. James S. Liebman et al., "A Broken System: Error Rates in Capital Cases, 1973–1995," mimeo, Columbia University School of Law, June 12, 2000, p. 6.

51. Quoted in Bob Herbert, "Criminal Justice Is Breaking Down around the Country," *Arizona Daily Star,* February 15, 2000, p. A11.

52. See the evidence in Liebman et al., "Broken System"; Cole, *No Equal Justice*; Berlow, "Wrong Man"; Jim Dwyer et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (New York: Doubleday, 2000); Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies of the Use of DNA Evidence to Establish Innocence after Trial* (Washington, D.C.: United States Department of Justice, 1996). For a general discussion of the problems of capital punishment, as ordinarily practiced in the United States, for liberty and democracy, see Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton, N.J.: Princeton University Press, 2001).

53. Cole, *No Equal Justice,* p. 22.

54. For the New York City, Boston, Philadelphia, and Des Moines examples, see ibid., pp. 23–27 and 40–41.

55. One of the most significant areas here concerns civil litigation that is potentially so costly as to lead innocent parties to acknowledge guilt, in effect, and settle rather than risk the costs of litigation and possible excessive verdicts. The present situation begs for reform that reduces or compensates for litigation costs for victorious defendants *in a manner that does not chill plaintiffs* and also creates generous monetary limits—but limits nonetheless—for punitive damages. The limits must remain generous in order to have genuinely punitive effect. In the case of businesses, a formula for limits might be tied, so that they have such effect, to a figure representing a sizable percentage of what would be healthy profits over a specified period of time. In *State Farm v. Campbell,* No. 01–1289 (2003), the Supreme Court showed appropriate concern that multiple individual punitive awards could, taken in combination, result in excessive punishment. A formula for limits must address that reasonable concern.

56. See earlier in this chapter at the close of the section entitled "Economic Opportunity."

57. See the section titled "Barriers to Political Equality" in Chapter 8.

58. Steven Ansolabehere et al., "Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States," *American Political Science Review* 96 (December 2002), pp. 767–78.

59. For the effect of malrepresentation on policy and budgetary outcomes, see Frances E. Lee and Bruce J. Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation* (Chicago: University of Chicago Press, 1999), pp. 158–85, and Ansolabehere et al., "Equal Votes, Equal Money."

I calculated the discrepancy in funding in the following way. In 2000, federal expenditures came to $1.6 trillion, or $5,818 per American. Citizens from the ten largest underrepresented states received $0.89 in expenditures back on each dollar of federal taxes they paid, whereas citizens from the twenty-five smallest overrepresented states received $1.39 in spending back for each dollar of federal taxes they paid (see the section titled "A Few Other Barriers" in Chapter 8). Based upon $5,818 for each person, citizens of the ten largest underrepresented states received on average $640 less per person than in taxes they sent to Washington, or $2,500 for a family of four. The twenty-five smallest overrepresented states (which together contain less than one-fifth of the nation's population) received on average about $2,000 more per person than in taxes they sent to Washington, or about $8,000 for a family of four.

60. Quoted in Elizabeth Kolbert, "Clouding the Air," *New Yorker,* September 29, 2003, p. 38.

61. See the section titled "Let the Free Market Work Its Job-Creating Wonders" in Chapter 4. The hypothesis itself wrongly assumes that the economy would grow more rapidly with substantial cutbacks in government. For example, it fails to appreciate the centrality of both government spending and investments for a great many major innovations that have propelled private enterprise and the economy's growth (discussed in Chapter 6). Similarly, it also overlooks how various forms of public assistance operate to buoy demand helpful to growth.

62. For the effect of a 20 percent increase in the minimum wage on employment and prices, see David Card and Alan B. Krueger, "Minimum Wages and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania," *American Economic Review* 84 (September 1994), pp. 772–93.

63. General issues relating to collective bargaining and worker representation are succinctly described in Derek Bok, *The State of the Nation: Government and the Quest for a Better Society* (Cambridge: Harvard University Press, 1996), pp. 257–62. See also J. J. Lawler, "The Influence of Management Consultants on the Outcome of Union Certification Elections," *Industry and Labor Relations Review* 38, no. 1 (1984), pp. 38–51; Margaret Levi, "Organizing Power: The Prospects for an American Labor Movement," *Perspectives on Politics* 1 (March 2003), pp. 45–68. The fear of employer intimidation and retaliation, resulting in part from mild penalties and weak enforcement, clearly plays a role in reducing the incidence and influence of collective bargaining in the United States. In addition, the United States lacks regulations facilitating the development of works councils and other such devices to represent workers' interests despite the near unanimous support among employees for associations of co-workers and widespread support for employee associations even among American executives and managers. Opinion polls indicate that approximately three times as many more workers want to organize than have done so. Enacting and enforcing stronger penalties against employer intimidation along with the creation of a regulatory framework to form employee associations should assist in reestablishing a stronger presence from workers. This, in turn, should help strengthen and restore the relationship between the overall productivity improvements of workers and advances in workers' real compensation that existed prior to the 1970s in the United

States and still exists more fully in many other major economies. In the case of enforcing civil rights in employer, consumer, and housing markets, the responsible governmental entities can enforce laws more surely and effectively by initiating their own random tests of discrimination based on race or gender through well-known audit procedures.

64. For proposals taking a similar direction, see Matthew Miller, *The Two Percent Solution: Fixing America's Problems in Ways Liberals and Conservatives Can Love* (New York: PublicAffairs, 2003).

65. At present, I estimate that expansion of the Earned Income Tax Credit above a $6.50 minimum wage will require approximately an additional $55 billion annually; extending health care insurance to currently uncovered households with no employer-assisted plans or who are unemployed, on a sliding scale based on income, $75 billion; doubling early childhood education and appropriating expenditures at least sufficient to meet the "No Child Left Behind" Act's own specification, $20 billion; expanded grants for postsecondary education, $10 billion; strengthening regulatory enforcement, $5 billion; expanding workforce development and retraining, $10 billion; added assistance for child care for workers, $15 billion; lifting the base payments of Social Security by $3,000 per person on a sliding scale, which would then begin to decline after households reach $9,000 in total income for one individual and $15,000 for two, $70 billion; providing long-term care insurance assistance for elderly households below 150 percent of median income, down to age sixty and on a sliding income scale, $30 billion; and supplementing the prescription drug benefit under Medicare to diminish the gap in coverage, $20 billion. Some reductions in present governmental spending for food stamps, housing assistance, and medical care for the uninsured will be possible through increases in the minimum wage, the Earned Income Tax Credit, and expanding health insurance coverage, lowering the net cost of the initiatives and bringing it to no more than $280 billion. Rescinding tax reductions since 2000 on dividends and capital gains will go a considerable way toward providing the funds to repay the Social Security system the money that has been borrowed from it over the years (largely to finance general tax reductions) and that the system is owed.

66. It represents about 2.5 percent of GNP. Added to the new expenditures are marginal increased costs to consumers resulting from raising the minimum wage moderately and the compliance costs that more vigorous enforcement of collective labor and equal rights regulations involve.

67. The four actions, respectively, have the potential to raise $80 billion, $70 billion, $40 billion, and up to $120 billion annually. The latter figure of $120 billion represents 60 percent of the IRS estimate of unpaid or evaded taxes annually that are owed by individuals, corporations, and partnership investors, not including offshore accounts. See Mary Williams Walsh, "IRS Tightening Rules for Low-Income Tax Credit," *New York Times,* April 25, 2003, p. C4. In the case of tax exemptions for employer pension contributions, the cutoff for exemption is taken at total annual contributions going beyond $7,000 for any worker, or 7 percent of a worker's earnings, whichever is more. In addition, rescinding tax reductions on dividends and capital gains enacted since 2000 can make the debt owed to the Social Security system, which has helped to defray past reductions in general tax revenues, far more manageable.

68. Mishel at al., *State of Working America, 2002–03,* p. 213, fig. 2T.

69. George H. W. Bush, "Inaugural Address," January 20, 1989, reprinted in United States Congress, Joint Congressional Committee on Inaugural ceremonies, *Inaugural Ad-*

dresses of Presidents of the United States: From George Washington 1789 to George Bush 1989 (Washington, D.C.: U.S. Senate, 1989), Senate Document 101–10, p. 348. Referring to the lack of funds available to the federal government, President Bush said, "We have more will than wallet."

70. Franklin Delano Roosevelt, "Inaugural Address," January 20, 1937, reprinted in *The Public Papers and Addresses of Franklin D. Roosevelt* (New York: Macmillan, 1941), 1937 volume, p. 1.

71. Richard E. Burke, *The Senator: My Ten Years with Ted Kennedy* (New York: St. Martin's Press, 1992), p. 31.

72. Most major liberal thinkers of the past half century have emphasized and defended equality *separately* from liberty, some of them to the point, indeed, that they actually derive liberty *from* equality. See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000). In *Political Liberalism* (New York: Columbia University Press, 1993), John Rawls points out: "No priority is assigned to liberty as such, as if the exercise of something called 'liberty' has a preeminent value and is the main if not the sole end of political and social justice" (pp. 291–92). See also John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980); Bruce Ackerman and Anne Alstott, *The Stakeholder Society* (New Haven: Yale University Press, 1999); Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991); Philippe Van Parijs, *Real Freedom for All: What (If Anything) Can Justify Capitalism?* (Oxford: Clarendon Press, 1995); and Brian Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995).

73. For both Abraham Lincoln and Thomas Jefferson, the principle that sufficient economic opportunity should be available to all to provide a minimally decent living through work and that a free individual deserves the full return of the fruits of his or her labor stood at the heart of their thinking. A good measure of their perspective is the importance they both attributed to assuring the availability of open public lands to access and ownership for all individuals who wanted to better their lives, seen in the Homestead Act in Lincoln's case and, in Jefferson's, in his proposal for the Virginia Constitution that every individual who did not own property be granted fifty acres of public land. For Jefferson's thinking, see also the introductory pages to Chapter 2 and the section entitled "The Restatement and the Thinking of the Founders." At the core of Lincoln's philosophy, as historian Andrew Delbanco points out, was his insistence on the right of every person, in order to be free, both to the fruits of his or her own labor and to a genuine chance at prosperity through work. As Delbanco put it, the two together combined to result in "erasing the line that divides those with hope from those without hope." See Andrew Delbanco, *The Real American Dream* (Cambridge: Harvard University Press, 1999), pp. 74–77. On Lincoln's views, see also the opening paragraph of Chapter 6.

74. In some cases, constitutional obstacles to reform exist here, yet they generally are less formidable than might appear at first. Effective steps exist *within the present constitutional structure* to make progress toward dealing with most of the problems. For example, each of the measures necessary to redress shortages of economic opportunity is fully constitutional. No constitutional issue exists about any of them.

Nor, in the case of the financing of political campaigns, is there any need to run afoul of Court decisions either by setting limits to the total spending of campaigns or by establishing additional restrictions on contributions by individuals to campaigns, in-

cluding one's own campaign. An important step forward can be accomplished by making matching public funding available in a timely manner to candidates for office who have met certain tests of viability (through meeting a threshold of signatures and small contributions, for instance) whenever any opposing candidate and/or independent campaign has surpassed specified expenditure ceilings. The same principle can apply to initiatives and referenda. Some states and localities already operate such systems. Some will say that their tax dollars should not be used to fund political ideas they oppose. Of course, public money now supports the salaries, offices, and publicity of elected officials even though it means using tax dollars from citizens who are strongly opposed to those same officials' political ideas. When we speak of elections and initiatives, no less than with the actions of elected officials themselves, we are speaking of authoritative (coercive) decision-making processes in which upholding the principle of political equality is particularly essential to the morality of individual liberty. Present election campaign systems nationally and in various states and localities that the courts have upheld indicate that public funding of campaigns as well as public systems furnishing offsetting funding for campaigns whose opponents surpass spending ceilings are fully constitutional.

In the case of organizing presidential elections according to the principle of equal political standing for each citizen that individual liberty morally requires, the possibility exists to advance us closer to this goal—though still imperfectly—through the present Electoral College. Imagine what might happen were the Court to apply the principle of equal political standing to the vote by holding that the practice of each state acting as a single unit in the Electoral College (which *is* a practice, not a constitutional requirement) has the effect of disenfranchising all citizens who are in the minority within each state, erasing their votes, and operating as if those votes simply did not exist. I do not pretend such action is likely; I suggest only that its possibility within the present constitutional structure does exist were the will there. In addition, we could deem certain practices as having special legitimacy and applicability if a minority president comes into office, such as the Senate filibuster. The same could be done to mitigate the power of less populous states in the Senate from imposing decisions on the more populous states.

With respect to the question of a full and fair trial, it is within the provenance of courts to establish a minimum standard for effective counsel that meets some genuine meaning of the term, one faithful to the equal standing that individual freedom requires. There is no constitutional prohibition, either, against courts and statutes correcting the other problems cited, before and following trial, that undercut equal standing before the law.

As for the appointment of federal judges, Article 2, section 2, of the Constitution grants Congress the authority to vest appointments to federal courts below the Supreme Court in a process different from presidential nomination, perhaps merit selection. The "advise" part of the "advise and consent" clause also opens possibilities for a different role for the Senate during the early stages of nomination to the Court.

75. Two other classes of individuals advanced especially in the period, too, through protections accorded to the disabled and to gay persons. Yet, these individuals also shared in the many setbacks described elsewhere in the book.

TEN: Rediscovering America's Vision

1. The morality of freedom is demanding. It parallels the Ten Commandments, for example, in prohibiting physically harming others as well as stealing, cheating, lying,

deceit, and negligence. It parallels both the Old and New Testaments in the responsibility it places on each able person to make his or her own way and the simultaneous responsibility it places on the affluent, the powerful, and the society at large to help the less affluent and less powerful. That latter responsibility in the morality of liberty includes affording each and every person adequate opportunity both to make a living through work and to improve through improved work. It also includes assuring every person equal political standing and equal legal standing. "Love thy neighbor as thyself" is as comfortable in the morality of liberty as in the Bible (see John Locke, *Of Civil Government: Second Treatise* (Chicago: Henry Regnery Co., 1955), chap. 2, secs. 4–6. A politics of values containing a demanding moral code need not be religious or sectarian; it is found no less in the logic of freedom based on the premise that every individual is sacrosanct and inviolable.

2. Quoted in Arianna Huffington, "Compassion for Enron Conservatives," *Arizona Daily Star,* January 10, 2002, p. B7.

3. See also the section titled "The Free Market with Compassion Added" in Chapter 2.

4. We may take the meaning of the common good, or public interest or general welfare, to be similar to political scientist Robert Goodin's depiction. He writes, "Something may be regarded as being in the public interest if and only if: (1) It is an interest that people necessarily share (2) by virtue of their role as a member of the public (3) which can best or only be promoted by concerted public action" (Robert E. Goodin, "Institutionalizing the Public Interest," *American Political Science Review* 90 [June 1996], p. 339). Reasoning from the morality of freedom, each individual necessarily has a primary interest in the protection and advancement of individual freedom. That primary interest gives rise to a multitude of questions about the relation among individuals in the society and the allied obligations. Such questions can be addressed and resolved only by society as a collectivity. See also J. A. W. Gunn, "Public Interest," in Terrence Ball et al., eds., *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), and Richard E. Flathman, *The Public Interest* (New York: Wiley, 1966).

5. The significant role government plays under freedom in the innovation and growth of technology and the economy is described at greater length in the section titled "Innovation in the Economy" in Chapter 6.

6. About 60 million Americans today were adults, and 160 million of us were alive during those years.

7. Chapter 9 summarizes a number of incursions on freedom that affect large numbers of Americans. Regarding those freedoms individuals once had that a majority of Americans have lost over the past generation, or now stand on the brink of losing, among the most serious is the ability of individuals to improve their living commensurate with the improved work they do in their job. For the details, including the substantial costs borne by the average American worker and family, see Chapter 3, the paragraphs surrounding notes 28–33, and Chapter 9. On top of this disturbing development, tens of millions of Americans are deprived of the ability to make a minimally decent living through work because of the shortage of adequate jobs (described in Chapter 3, the paragraphs surrounding notes 17–26).

8. For examples from Roosevelt, see Chapter 9, the paragraphs surrounding note 70.

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